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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are nonimmigrant aliens a suspect class for whom strict scrutiny equal protection analysis should be applied to invalidate the rationally-based admission, tuition, and fee policies of public colleges and universities?

2. Does an automatic violation of the supremacy clause follow from a denial of equal protection to nonimmigrant aliens in the granting of "in-state" benefits?

3. Did the lower courts fail to give proper effect to *Toll v. Moreno*, 441 U.S. 458 (1979), and to other decisions of this Court when they concluded that the University of Maryland's policy created an irrebuttable presumption violative of due process until June 23, 1978?

4. Should *Vlandis v. Kline*, 412 U.S. 441 (1973), be overruled?

5. Is the eleventh amendment a bar to the retroactive tuition refunds that the lower courts ordered on the premise that they could reaffirm the district court's order of July 13, 1976, which this Court's decision in *Toll v. Moreno*, 441 U.S. 458 (1979), had effectively vacated?

PARTIES

The parties to the proceeding in the court of appeals were John S. Toll, President, University of Maryland, and the University of Maryland, as the appellants; and Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg, and Renee Otero, Jr., as the appellees.

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Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess. (June 15, 1977) 18

Linzer, The Meaning of Certiorari Denials, 79 Colum. L. Rev. 1227 (1979) 26

Note, The Equal Treatmentof Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979) 16

J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law (1978) 24

Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023 (1979) 18

Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092 (1977) 5

Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275 .....5, 15, 16, 17

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PETITION FOR WRIT OF CERTIORARI

John S. Toll, President of the University of Maryland, and the University of Maryland, pray that a writ of certiorari issue to review the judgment entered in this case on March 26, 1981, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), and is reprinted in the separately bound appendix to this petition (App. la). The opinions of the United States District Court for the District of Maryland that occasioned the appeal are reported as *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979), and *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980); these opinions are reprinted in the appendix (App. lla & 29a respectively).

This litigation has produced a number of additional opinions, including two of this Court. The first opinion of the district court is reported as *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), and is reprinted in the appendix (App. 55a). While the affirmance of this decision is reported as *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), the per curiam opinion of the court of appeals was not reported and is reprinted in the appendix (App. 101a). After granting certiorari, *Elkins v. Moreno*, 434 U.S. 888 (1977), this Court, after briefing and argument, issued its first opinion, *Elkins v. Moreno*, 435 U.S. 647 (1978), which is reprinted in the appendix (App. 105a), certifying a question of state law to the Court of Appeals of Maryland. The opinion of the Maryland court is reported as *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), and is reprinted in the appendix (App. 137a). This Court's second opinion, reported as *Toll v. Moreno*, 441 U.S. 458 (1979), which is reprinted in the appendix (App. 157a), vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case to the United States District Court for the District of Maryland for further consideration.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1981. The jurisdiction of this Court rests on the Constitution, article III, section 2, clauses 1 and 2, 28 U.S.C. § 1254(1) (1976), and 28 U.S.C. § 2101(c) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I, section 8, clause 4:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization.

Article VI, clause 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV, section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 8, section 1101(a)(15) (1976) is reprinted in the appendix (App. 162a).

University of Maryland Policies

The policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes is reprinted in the appendix (App. 167a).

A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens is reprinted in the appendix (App. 172a).

STATEMENT

A. Introduction

Most public institutions of higher education in the United States, including the University of Maryland, accord preferential admission and charge lower tuition rates and fees to "in-state" or "resident" students. For *eligible* classes of students, domicile is the key to in-state or resident status.[1] A number of groups of students, however, are routinely excluded without reference to their domicile. At the University of Maryland, for example, the in-state policy denies benefits to members of the Armed

[1] The in-state policy of the University of Maryland, which is reprinted in the appendix (App. 167a), lists a number of non-exclusive indicia of domicile that are used to determine a student's status. These include presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments. If the student is financially dependent on a parent or spouse, the status of the parent or spouse rather than of the student is looked to in making the determination.

Forces who are assigned by the military to attend the institution for educational purposes. Also excluded are students who are financially dependent on parents or a spouse not domiciled in the State. The final circumstance in which the student's domicile is ignored by the University of Maryland, in a policy common to those of most public colleges and universities in the nation,[2] is where nonimmigrant aliens are involved;[3] only United States citizens and "immigrant aliens lawfully admitted for permanent residence" are eligible for in-state benefits.

[2] This fact explains why the American Council on Education, the nation's largest and foremost association of colleges and universities, as well as 28 States, filed an *amici curiae* brief in this Court supporting the petitioner in Elkins v. Moreno (App. 105a), 435 U.S. 647 (1978).

[3] As defined by the immigration law, 8 U.S.C. § 1101(a)(15) (1976), which is reprinted in the appendix (App. 162a), there are twelve general categories of nonimmigrants: ambassadors and diplomats and their families (A-visa); temporary visitors for business or pleasure (B-visa); aliens in transit (C-visa); alien crewmen (D-visa); traders and investors (E-visa); foreign students (F-visa); officers and employees of and representatives to international organizations (G-visa); temporary workers (H-visa); foreign journalists (I-visa); exchange visitors (J-visa); fiancees or fiances of U.S. Citizens (K-visa); and intra-company transfers (L-visa).

As noted by one scholar, nonimmigrant aliens "do not share all the burdens that are imposed on residents of the country . . . [and] [i]n many respects their position is similar to that of nonresident citizens who are temporarily present in the state." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. On the other hand, resident aliens, like citizens "serve in the Armed Forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law [and] enter the United States with the intention of making this country their home." Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 Mich. L. Rev. 1092, 1110-11 (1977).

On the basis of alien address reports, as of January 1977, there were 58,035 permanent resident aliens and 8,391 nonimmigrants in Maryland. *1977 Annual Report: Immigration and Naturalization Service* at 108.

By its terms and operation, the University of Maryland's in-state policy benefits many aliens. In the fall of 1979, for example, there were 1255 permanent resident aliens registered at the three principal undergraduate campuses of the University, and nearly 1000 of these were in-state students subject to lower tuition and fee rates. By contrast, only 493 nonimmigrants, classified as out-of-state students, were registered at that time.

B. Previous Court Proceedings

On May 27, 1975, three of the named respondents, nonimmigrant aliens holding G-4 visas[4] and children of employees of certain international banks based in Washington, D.C., who were then undergraduate students at the University of Maryland, brought a class action suit in the United States District Court for the District of Maryland against the University of Maryland and its then-President, Dr. Wilson H. Elkins. The respondents challenged the constitutionality of the University's policy of granting admission on a preferential basis and charging lower tuition and fees to in-state students. Alleging jurisdiction under 28 U.S.C. §§ 1343(3) & (4) (1976), the international bank students contended that by excluding nonimmigrants from in-state benefits, the policy created an irrebuttable presumption of nondomicile in violation of

[4] G-4 aliens are a group of nonimmigrants comprised of "officers or employees of international organizations and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv)(1976). The respondents' fathers were employed by the International Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank). Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502, Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d)(1976); 26 U.S.C. § 893(a)(1976).

due process and denied them equal protection of the laws by discriminating against them because of their alienage.

On cross motions for summary judgment, the district court held on July 13, 1976, that the in-state policy as applied to G-4 aliens violated due process and enjoined its enforcement (App. 55a). *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976). The court did not decide the students' equal protection claim or the contentions they raised in legal memoranda that the in-state policy interfered with the G-4's treaty tax exemption and constituted a regulation of immigration in violation of the supremacy clause (App. 89a). 420 F. Supp. at 560. On August 3, 1976, the court stayed the injunctive portions of its order on the condition that the University refund tuition and fee differentials to eligible G-4 students in the event the July 13, 1976, order "were finally affirmed on appeal" (App. 99a-100a).

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on April 27, 1977, in a one-paragraph, unpublished per curiam opinion (App. 101a). *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977). The appellate court later stayed its mandate "on the same terms as the district court namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who timely filed requests for reclassification to 'in-state' status would receive a refund of excess fees paid during the pendency of the stay" (App. 103a-104a).

On October 11, 1977, this Court granted a petition for writ of certiorari to consider whether, in light of *Weinberger v. Salfi*, 422 U.S. 749 (1975), the University's policy created an irrebuttable presumption. *Elkins v. Moreno*, 434 U.S. 888 (1977). Following argument, the Court (with two dissents) sua sponte ordered certified to the Court of Appeals of Maryland the question of whether G-4 aliens

can become Maryland domiciliaries (App. 105a, 118a, 124a-25a). *Elkins v. Moreno*, 435 U.S. 647, 662, 668-69 (1978). On February 21, 1979, the Maryland court held that G-4 aliens could be domiciled in Maryland under common law principles (App. 137a, 156a). *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979).[5]

Eight months before the latter decision, on June 23, 1978, the Board of Regents of the University of Maryland had adopted, and transmitted to this Court and the Court of Appeals of Maryland, "A Resolution Clarifying the Purposes, Meaning, and Application of the [In-State Policy] Insofar As It Denies In-State Status to Nonimmigrant Aliens" (App. 172a). The clarifying resolution reaffirmed the in-state policy; reiterated its rational bases, including the principle that the costs of a public college or university education should be equalized between various classes in measure to their contributions to the State's economy; and asserted that these rationales were served regardless of whether the policy "conforms with the generally or otherwise applicable definition of domicile under the Maryland common law" (App. 174a).

On April 30, 1979, this Court issued its second opinion, which stated in relevant part:

> Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount"

[5] Dr. John S. Toll, who became President of the University of Maryland on July 1, 1978, was substituted as a party for Dr. Elkins while the case was pending before the Court of Appeals of Maryland.

> policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi*." . . . *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court. We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

(App. 157a, 160a) *Toll v. Moreno*, 441 U.S. 458, 461-62 (1979).

Subsequently, the district court, again utilizing irrebuttable presumption analysis, held on October 31, 1979, that the University's in-state policy violated due process before June 23, 1978. Nevertheless, the court ruled that the identical policy, applied the same way, with identical results, did not create an unconstitutional irrebuttable presumption after the date of the clarifying resolution (App. 11a, 27a-28a). *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (D. Md. 1979).[6] The court also concluded that the clarifying resolution, although it did not alter the language or operation of the in-state policy, was nevertheless a "change in that policy" that could not be given "retroactive effect" to deny the students their claim to refunds from the July 13, 1976, date of the court's initial order (App. 27a). *Moreno v. Toll*, 480 F. Supp. at 1124. The court requested proposed orders from counsel to effectuate

[6] The district court reasoned in a circular fashion that the Board of Regents' clarifying resolution took the policy out of the irrebuttable presumption mold because "[g]iven the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify" (App. 28a). 480 F. Supp. at 1125. In its first opinion, the district court implicitly rejected a similar argument by the University that its definition on domicile could differ from the common law applications of domicile in other contexts (R. 241-47).

these refunds, and the petitioners objected that a requirement of retroactive monetary relief would offend thet eleventh amendment because the condition on which possible refunds had been premised in the stay orders had not been fulfilled.

On April 17, 1980, the district court further held that the in-state policy discriminated against nonimmigrant aliens and interfered with Congress' exclusive control over immigration (App. 29a, 44a, 46a-47a). *Moreno v. Toll*, 489 F. Supp. 658, 667, 668 (D. Md. 1980). After additional correspondence and a conference with counsel, in which the petitioners reiterated their objections to retroactive monetary relief, the court issued an order on May 30, 1980, declaring the in-state policy unconstitutional on due process grounds before June 23, 1978, and unconstitutional on equal protection and supremacy clause grounds before, on, and after June 23, 1978 (App. 48a). In an attempt to circumvent the eleventh amendment problem, the court purported to reaffirm its order of July 13, 1976. In addition, retroactive monetary relief was ordered for a four year period, even though the policy had been declared constitutional on due process grounds for the period after June 1978 and was not invalidated on other constitutional grounds until April 1980. Immediately thereafter, Dr. Toll appealed from this order granting an injunction and sought and obtained a stay of the court's order (App. 52a).[7]

On March 26, 1981, in a per curiam opinion, the United States Court of Appeals for the Fourth Circuit affirmed

[7] Although the University of Maryland had been dismissed as a party to the case in 1976, the judgment was entered "AGAINST DEFENDANTS." Thus, both the University and Dr. Toll joined in the notice of appeal. Subsequently, the district court entered an amended judgment in favor of the University and against Dr. Toll, but the appeal had already been docketed. For this reason, the petitioners joined in an amended notice of appeal. *See* Fed. R. Civ. P. 60(a).

the decision of the district court (App. 1a). *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981). The appellate court essentially adopted the opinion of the lower court on the due process, equal protection, and supremacy clause issues and affirmed for "reasons sufficiently stated in the opinion[s] of the district court" (App. 5a, 6a). 645 F.2d at 220.

Thus, the decisions below concluded that a classification disadvantaging nonimmigrant aliens is based upon alienage, affects a "suspect class," and must therefore be justified by a compelling interest. In so doing, these courts held that the term "resident alien" in decisions of this Court included immigrants as well as nonimmigrants (App. 37a), 489 F. Supp. at 663, rather than only those aliens who "are obligated to pay their full share of taxes," *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), and who "may be called into the armed forces." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

The decisions below did not mention the overwhelming number of aliens who qualify under the University's policy. The lower courts found "immaterial" that an effect of the policy was to deny in-state status to large numbers of *citizens*, specifically, out-of-staters and certain military personnel (App. 39a). 489 F. Supp. at 664. They refused to rely upon language in *Foley v. Connelie*, 435 U.S. 291 (1978), indicating that strict judicial scrutiny is applicable only to alienage classifications denying "necessities of life," and instead concluded that *Nyquist v. Mauclet*, a 5-4 decision involving a state educational scheme pointedly disadvantaging permanent resident aliens — rather that nonimmigrants — governed their inquiry.

Finally, the lower courts declined to follow the view of the only two members of this Court who had previously spoken on the question and concluded that *Mauclet* was

not controlling in this case (App. 131a-32a n.6), *Elkins v. Moreno*, 435 U.S. 647, 677, n.6 (opinion of Rehnquist, J., joined by Burger, C.J., dissenting from certification), denigrating their remarks as "merely dicta in a dissenting opinion" (App. 41a n.13). 489 F. Supp. at 665 n.13.[8] Thus, they applied strict scrutiny equal protection analysis to the in-state policy and concluded that none of the justifications for the policy furthered a compelling interest, although some were or might be permissible under a rational basis inquiry (App. 42a-43a). 489 F. Supp. at 666. In short, they rejected the University's rationale that a class which avoids substantial payment of income taxes — the major state tax source of funds to operate the University — should not be entitled to in-state tuition rates.[9]

On the supremacy clause issue, the lower courts found that the in-state policy automatically violated the supremacy clause because the policy had failed to pass muster under strict scrutiny equal protection analysis. They concluded that the policy interfered with Congress' exclusive control over immigration solely because they had found invidious discrimination without compelling justification (App. 46a-47a). 489 F. Supp. at 667-68.[10]

On the due process issue the decisions below held that this Court's decision in *Toll v. Moreno* had not removed

[8] The majority opinion in Elkins v. Moreno also suggested that *Mauclet* did not automatically control the result in this case (App. 114a). 435 U.S. at 658.

[9] The University had argued that a sizeable number of nonimmigrants in visa categories "A" and "G" were able to avoid paying federal and state income tax on their salaries and that persons in other nonimmigrant visa categories, although they may pay some income tax, are neither permitted nor expected to remain in this country long enough to make substantial tax contributions to the State of Maryland.

[10] The district court rejected the second prong of the respondents' supremacy clause attack, that is, that the in-state policy interfered with the agreements of the international banks (App. 44a-45a). 489 F. Supp. at 667. This issue was not addressed by the court of appeals.

the irrebuttable presumption issue from the case for the period before June 23, 1978, the date of the Board of Regents' clarifying resolution. Instead, the lower courts held that before that date the in-state policy conclusively and unconstitutionally presumed that aliens could not acquire domicile so as to qualify for in-state benefits. Without comment, the lower courts passed over the University's contentions that the district court itself had actually decided in July 1976 that the in-state policy could not be rationally justified on the basis of cost equalization or administrative convenience (App. 88a), 420 F. Supp. at 560, in misreliance upon *Vlandis v. Kline*, 412 U.S. 441 (1973).[11]

Specifically addressing the refund question, the court of appeals held that the University had waived its eleventh amendment immunity by agreeing to pay refunds as a condition for obtaining a stay of the district court's order in 1976.[12] The appellate court refused to take note of the express limitation on the University's liability contained in the stay order, that is, that the district court order be "finally affirmed on appeal," rather than be vacated as occurred as a result of this Court's action in *Toll v. Moreno*, 441 U.S. 458 (1979).

On April 15, 1981 (and again on May 11 and June 9), the court of appeals stayed the issuance of its mandate

[11] In July 1976 the lower court as well as counsel were unaware that Weinberger v. Salfi, 422 U.S. 749 (1975), had so cut back on Vlandis v. Kline, 412 U.S. 441 (1973), that the *mere assertion* of a cost equalization rationale (which had been rejected in *Vlandis*) could now defeat a due process irrebuttable presumption challenge. In 1976, in the district court, the case was argued by both sides and decided by the court on the false premise that *only* a "universally true" presumption of nondomicile for G-4 aliens could survive constitutional attack.

[12] The district court resolved the refund issue in a different fashion. It construed the June 1978 clarifying resolution of the Board of Regents as a retroactive substantive policy change that could not be given effect to deprive the international bank students of their supposedly vested rights to refunds (App. 26a-27a). 480 F. Supp. 1124-25.

pending the University's filing of a petition for writ of certiorari with this Court.

REASONS FOR GRANTING THE WRIT

I.

IN CONCLUDING THAT GRANTING A LOWER EDUCATIONAL SUBSIDY TO NONIMMIGRANT ALIENS TRIGGERS STRICT SCRUTINY EQUAL PROTECTION ANALYSIS, THE LOWER COURTS OVER-EXTENDED THE ALIEN/SUSPECT CLASS DOCTRINE BEYOND THE REASONABLE BOUNDS OF ANY DECISION OF THIS COURT AND ACTED IN DIRECT CONFLICT WITH THE VIEWS OF OTHER COURTS AND COMMENTATORS.

When certiorari was granted in this case in 1977 on a single constitutional question, involving a single subclass of nonimmigrants, the stakes were sufficiently high that a majority of the States joined as amici curiae in support of the University of Maryland in urging reversal. Now, in its present and final posture, this case raises far greater issues. Foremost among these is the lower courts' invalidation on equal protection and supremacy clause grounds of the line drawn by most public college and universities in the United States between those classes that qualify for in-state admissions standards, tuition, and fees and those classes that do not.[13]

The petitioners have advanced only "rational bases" for the exclusion of nonimmigrants from in-state benefits, including the fact that as a general proposition members of the nonimmigrant class, either because of state income tax exemptions or their limited stay in this country, do not

[13] The decisions below, if allowed to stand, would permit *all* categories of nonimmigrants including foreign students (F & J visa holders) to be eligible for in-state benefits. *See* Lok v. INS, 548 F.2d 37, 40 (2d Cir. 1977) ("It is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, see, e.g., 8 U.S.C. § 1101(a)(15)(J) (student).").

make the same contribution to the cost of education at the University as citizens or permanent resident aliens. The lower courts effectively found that the University's in-state policy was rationally based, but insufficient to withstand the strict judicial scrutiny applicable to certain state classifications affecting aliens.

In every case in which this Court has applied the strict scrutiny standard of equal protection review to a state classification affecting aliens, the challenged statute or practice discriminated against permanent resident aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971). In addition, "[t]he Court has taken pains in each of the recent cases to make clear that the plaintiffs were resident aliens, and in explaining why alienage classifications are suspect, it has referred pointedly to the position of resident aliens." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312 n.140. This has caused one scholar to note:

> The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens. It has not even suggested that such aliens are within the class protected under the suspect classification doctrine.

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the Government*, 1977 Sup. Ct. Rev. at 312.[14]

Indicative of the lower courts' misreading of this Court's alienage decisions is their attempt to incorporate nonim-

[14] Professor Rosberg has said that "one has an intuitive sense that the denial of benefits to nonimmigrant aliens rests on a real difference between their position, on the one hand, and the position of both resident aliens and citizens on the other." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312.

migrants within the meaning of the term "resident alien." However, in *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that "[a]liens like citizens pay taxes and may be called into the armed forces. Unlike . . . short-term residents . . . aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." Similiarly, in *Mauclet*, the majority noted that "[r]esident aliens are obligated to pay their *full share* of the taxes that support the assistance programs." 432 U.S. at 12 (emphasis added). Most nonimmigrants do not live within the State for many years or contribute significantly to its economy. Moreover, G-4 aliens, among other categories of nonimmigrants, are not subject to the full range of state taxes. Finally, nonimmigrants may not be drafted as long as they maintain their nonimmigrant status. 32 C.F.R. § 1611.2 (1980). Thus, it is clear that this Court has not been thinking of nonimmigrants when it has displayed its special solicitude for "resident aliens."[15] *See United States v. Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979), in which the court, after citing to a definition of "resident alien" which excluded nonimmigrants, cogently observed:

> The numerous cases which have struck down alienage classifications have all involved resident aliens . . . . These cases have often emphasized that

[15] In fact, one commentator has drawn the following conclusion from the Court's prior handling of this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham*. The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069, 1083 (1979). *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. at 312.

> resident aliens live in American communities, must obey our laws, pay taxes, serve in the armed forces, and have made significant contributions to our country . . . It is the burdens which resident aliens bear along with citizens that make absolute bars to aliens qualifying for work and educational opportunities so irrational. Resident aliens are in many respects just like citizens, and classifications which disadvantage them will usually be subjected to strict judicial scrutiny. The philosophical and legal support for the doctrine is completely absent when a case involves a non-resident alien.

See also Matter of Anwo, Interim Decision #2604 at 5-6 (BIA 1977), *aff'd sub nom. Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (The lawful permanent resident "enjoys greater rights than the nonimmigrant alien and assumes commensurate responsibilities and duties."); *Wong v. Board to Trustees of California State Universities and Colleges*, 125 Cal Rptr. 841. (Cal. App. 1975) (upholding the constitutionality of a California statute that denied in-state benefits to nonimmigrants).

Second, so many aliens are eligible for in-state status at the University that it is irrational to contend that the in-state policy denies its benefits on the basis of alienage. In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University than there were nonimmigrants, and most of the permanent resident aliens qualified for the greater in-state subsidy. And on the basis of alien address reports, there were seven times as many permanent resident aliens in the State of Maryland as there were nonimmigrants. *See* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 313 (A State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Third, in-state tuition and fees are not "necessities of life." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974). As noted by Chief Justice Burger for the majority in *Foley v. Connelie*, 435 U.S. 291, 295 (1978), all of this Court's cases applying strict scrutiny to state alienage classifications have involved exclusions which "struck at the noncitizen's ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." A dollar differential, not a right to education, is at stake here, an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year. Certainly no claim can be made that professional employees of the World Bank and the Inter-American Development Bank, with their generous array of salaries, fringe benefits (including the legal and other costs of this litigation) and dependency allowances (*see* Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess., at 46-47 (June 15, 1977)), are unable to pay the differential. More importantly, at least for employees at the World Bank, neither the students not their parents need to pay the differential at all, because the bank itself pays it in the form of a "tuition equalization subsidy."

Fourth, strict scrutiny is not applicable where, as here, it is unreasonable to impute to the Federal Government a policy against the University's in-state scheme and, in fact, the in-state policy is consistent with the purposes of federal immigration law.[16] Just like the University of

[16] *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1063-64 (1979) ("Some state alienage-based classifications are sustained and others struck down not really because all the former pass muster under a strict standard of review, whereas all the latter do not, but because only the former can be deemed consonant with implicit federal policy regarding aliens."). *See also* Comment, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 Yale L.J. 940, 959 (1980).

Maryland and other public colleges and universities across the nation, the Federal Government has drawn the line on various benefit schemes between nonimmigrants on one hand and citizens and permanent resident aliens on the other. *See, e.g.*, 42 U.S.C. § 1395(o) (1976) (Medicare benefits) (upheld in *Mathews v. Diaz*, 426 U.S. 67 (1976)); 45 C.F.R. § 177.201 (1980) (excluding nonimmigrant aliens from eligibility for federal, state, and private programs of low interest student loans).[17] This latter regulation makes it absolutely clear that the Federal Government has no policy in favor of according educational benefits to nonimmigrants — in fact, just the opposite. If anything, 45 C.F.R. § 177.201 reflects a purpose of the immigration laws to encourage a change of immigration status to permanent resident alien — a purpose with which the University's in-state policy is entirely consistent.

Finally, two members of this Court have already spoken to the applicable standard to gauge the classification at issue here. Justice Rehnquist, in a opinion joined by Chief Justice Burger, has said:

> Unlike the situation in *Nyquist* [v. Mauclet, 432 U.S. 1 (1977)], the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6 and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. *See Starns v. Malkerson, supra* [401 U.S. 985 (1977)].

[17] In Mathews v. Diaz, 426 U.S. 67 (1976), this Court upheld the denial of Medicare benefits to nonimmigrants upon application of a rational basis equal protection standard. In so doing, the Court suggested that the only reason state exclusion of some aliens might not be justified is because the state invariably treated out-of-staters and aliens differently. 426 U.S. at 85. The University's in-state policy does not suffer from such a defect in that *both* out-of-staters and nonimmigrants are denied the benefit.

(App. 131a-32a n.6) *Elkins v. Moreno*, 435 U.S. 647, 676, n.6 (1978) (opinion dissenting from certification of question of state law to the Court of Appeals of Maryland).[18]

In summary, the decisions below on the equal protection issue represent an unprincipled exposion of suspect class analysis with manifestly harmful financial consequences for the nation's public college and universities. For these reasons, review by this Court is appropriate.[19]

II.

THE DECISIONS BELOW REPRESENT A CLEARLY UNREASONABLE APPLICATION OF THE PREEMPTION DOCTRINE AT ODDS WITH DECISIONS OF THIS COURT AND IN DISREGARD OF STATE EDUCATIONAL INTERESTS.

In concluding that the exclusion of nonimmigrants from in-state benefits amounted to unconstitutional state regulation of immigration, the lower courts intruded into an area that is principally a matter of state and local concern. The petitioners submit that how a public college or university determines eligibility for preferential admissions standards, tuition, and fees is within the realm of permissible state regulation, and thus the lower courts' supremacy clause decision must be reversed.

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court said that a state statute which prohi-

[18] In addition to cost equalization, the University proffered the following rational bases for the in-state policy's exclusion of nonimmigrants: limitation of University expenditures; efficient administration of the in-state determination and appeals process; and prevention of disparate treatment among categories of nonimmigrants.

[19] Decisions by this Court in Cabel v. Chavez-Salido, *cert. granted*, ___ U.S. ___, 101 S. Ct. 1511 (1981) (citizenship requirement for peace officer), and Plyler v. Doe, *cert. granted*, ___ U.S. ___, 101 S. Ct. 2044 (1981) (denial of elementary school education to illegal aliens), will not resolve the equal protection issue in this case. However, review of the decisions below, as well as the pending cases, offers the Court an opportunity to decide most of the questions troubling this area of the law.

bited an alien from earning a livelihood so burdened the entrance or residence of aliens as to amount to a regulation of immigration. For the same reason, the Court in *Graham v. Richardson*, 403 U.S. 365 (1971), struck down stringent state residency requirements denying to resident aliens welfare benefits that were essential to life, literally forcing them out of the country. Chief Justice Burger summarized the principle of these cases in *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (emphasis added):

> These exclusions struck at the noncitizen's *ability to exist* in the community, a position seemingly inconsistent with the congressional determination *to admit the alien to permanent residence.*

This preemption doctrine has never been applied to an enactment which disadvantaged only nonimmigrants (rather than all aliens). Moreover, the doctrine has no application to the denial by a State of a benefit that, like a tuition differential, is not a necessity of life. Finally, where, as here, the state regulation is harmonious with the federal scheme, a preemption challenge must fail. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).[20]

In the present case, the decisions below disregarded these principles to fashion a rule automatically invalidating on supremacy clause grounds every asserted discrimination against an alien subclass. First, the rule of the lower courts is analytically unsound. It suggests that a supremacy clause violation can be justified upon the showing of a compelling interest (App. 47a). 489 F. Supp.

[20] The Federal Government presently denies its educational benefits to G-4's and other nonimmigrants. *See* 45 C.F.R. § 177.201. In addition, it should be noted that employees of most international organizations derive their income tax advantage from federal law, 26 U.S.C. § 893 (1976), and are required to waive their tax exemption upon adjustment of immigration status. The rationale of the University's in-state policy is entirely consistent with this federal policy.

at 668. This is absolutely false. *See Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84, 93 (1963). Moreover, such a per se rule refuses to recognize that this Court on occasion has sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated. *See Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977).[21]

Finally, the lower courts ignored the rule of *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976), that "even if . . . local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . . ." The University's in-state policy, like those of most public colleges and universities, has absolutely no impact on immigration. For this reason, review by this Court is necessary to correct the lower courts' dangerous supremacy clause precedent.

III.

THE LOWER COURTS REFUSED TO GIVE EFFECT TO THE DECISION IN *TOLL V. MORENO*, 441 U.S. 458 (1979), EMBRACED A CONSTITUTIONAL DOCTRINE DISFAVORED BY THIS COURT, AND ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S IN-STATE POLICY CREATED AN IRREBUTTABLE PRESUMPTION VIOLATIVE OF DUE PROCESS PRIOR TO JUNE 1978.

In its rush to save refunds for the international bank students and salvage the remnants of its 1976 opinion, the district court (and, by affirming, the appellate court) has embraced a constitutional doctrine repeatedly shunned by this Court and soundly rejected by many of the circuit courts of appeals. In so doing, the lower courts invalidated what they conceded to be a rationally-based policy and demonstrated the unreasonableness of a constitutional

[21] *Skafte* rejected a preemption challenge, as well as an equal protection challenge, to a State's ban on voting by aliens.

doctrine that can be avoided by the mere assertion of alternate purposes for a statutory or regulatory scheme (*see Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977))[22] — a doctrine that can be avoided, as the decisions below held, by the announcement of a rationale for a policy without any real change in the language, operation, or effect of that policy.

In *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), this Court severely limited the use of irrebuttable presumption analysis out of concern that it had become "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." And after *Salfi*, the doctrine has fallen into extreme disfavor, that is until the present case. As noted by the Court of Appeals for the Nineth Circuit:

> We are aware of no cases since *Salfi* which have relied upon this analysis, with the exception of one brief per curiam opinion in which the facts were squarely governed by [Cleveland Board of Education v.] *LaFleur* [414 U.S. 632 (1974)]. *Turner v. Department of Emp. Security*, 432 U.S. 44, 46, 96 S. Ct. 249, 46 L. Ed. 2d 181 (1975). The Court has declined recent invitations to revive the doctrine. In *Fiallo v. Bell*,

[22] In *Hodory*, the Court rejected an irrebuttable presumption challenge to a statute imposing a disqualification for unemployment benefits when the claimant's unemployment was due to certain labor disputes. In so doing, the Court noted:

> Appellee also claims that [the statute] creates an impermissible "irrebuttable presumption." This argument requires two assumptions. First, appellee must assume that the *only purpose* of the statute is to measure "innocence." Then he must assume that the disqualification provision represents a presumption that any person laid off due to a strike is not innocent. If the statute is *designed to serve any purpose* other than measuring innocence, appellee's implication of an irrebuttable presumption fails. As we discuss below, the statute clearly has purposes other than measuring the innocence of the disqualified worker.

431 U.S. at 490 n.18 (emphasis added).

430 U.S. 787, 791, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977), the appellants raised the conclusive presumption issue, but the Court refused to deal with it in its analysis. Similarly, in *Ohio Bureau of Emp. Serv. v. Hodory*, 431 U.S. 471, 490 n.18, 97 S. Ct. 1898, 52 L Ed. 2d 513 (1977), the Court acknowledged that an irrebuttable presumption argument had been raised, but summarily disposed of it in a footnote. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24, 96 S. Ct. 2282, 49 L. Ed. 2d 752 (1976), such an argument was rejected with a reference to *Salfi*, and in *First National Bank v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 1413, 55 L. Ed. 2d 707 (1978), a conclusive presumption argument raised by the parties in the lower court was not discussed by the Supreme Court. *Cf. Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978) (decision whether to limit or overrule *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), an important irrebuttable presumption case, avoided).

deLaurier v. San Diego Unified School District, 588 F.2d 674, 683 n.16 (9th Cir. 1978).[23] *See also Trafelet v. Thompson*, 594 F.2d 623, 629-30 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979), for another review of this Court's continued disinterest in claimed irrebuttable presumptions and of the dismissal of the doctrine by many of the circuit courts of appeals; J. Nowak, R. Rotunda, & J. Young, *Handbook on Constitutional Law* 497 (1978).

Despite the clear desire of this Court not to employ irrebuttable presumptions to invalidate rationally-based state classifications, the lower courts nevertheless concluded that they had to decide the irrebuttable presumption issue and that it had not been removed from the case. This is a patent misreading of *Toll v. Moreno* (App. 157a),

[23] To the Ninth Circuit's list of Supreme Court cases ignoring or rejecting irrebuttable presumption contentions might be added Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Knebel v. Hein, 429 U.S. 288 (1977); Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977); and Friedman v. Rogers, 440 U.S. 1 (1979).

441 U.S. 458 (1979), and a refusal to adhere to the law of the case. *Toll* left no room for the lower courts to conclude that the district court's 1976 opinion any longer governed, for any period of time, the rights and obligations of the parties. If this Court wanted to reach that result, it would have affirmed the 1977 per curiam decision of the court of appeals, or dismissed the writ of certiorari as improvidently granted. Instead, this Court vacated the judgment of the court of appeals and remanded the case to consider "new" constitutional issues, *viz.*, the equal protection and supremacy clause questions (*see Elkins v. Moreno* (App. 114a & 114a n.7), 435 U.S. at 658 and 658 n.7), not the due process question originally presented to this Court. Moreover, the reason given for the Court's action in *Toll* — that *Vlandis v. Kline* was inapplicable and that therefore the Court need not consider the question of overruling *Vlandis* as modified by *Weinberger v. Salfi* (App. 160a), *Toll v. Moreno*, 441 U.S. at 461-62 — makes it clear that this Court believed that for these parties, and as far as the entire case was concerned, the issue had been obviated. Obviously, if the Court though that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be "overrule[d] or further limit[ed]" (App. 116a). *Elkins v. Moreno*, 435 U.S. at 660.

In short, this Court's conclusion that *Vlandis* is inapplicable to this litigation and that no irrebuttable presumption exists was the law of the case and not subject to reexamination by the lower courts. *See Venido Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (when a case has been once decided by the Supreme Court on appeal, and remanded to the lower court, "whatever was before the Supreme Court, and disposed of by its decree, is considered as finally settled.").

In addition, the lower courts' bifurcated result on the due process question, based on the June 23, 1978, clarifying resolution, demonstrates the analytical bankruptcy of the irrebuttable presumption doctrine. That resolution merely reiterated "rational bases" for the in-state policy argued previously and asserted a cost-equalization rationale present in the record in the district court and in pre-litigation statements of University officials. It did not change the language, operation, or effect of the in-state policy, which denied in-state benefits to nonimmigrants before June 1978, and did so afterwards. To draw a constitutional difference (as did the lower courts) from the issuance of such a resolution recognizes that the irrebuttable presumption doctrine is no more than a paper tiger.

Finally, to deny review is this case, after this Court had once granted certiorari to decide the due process issue and after the case had acquired a history among courts and commentators, would be an open invitation to judges to begin reapplying the disfavored irrebuttable presumption doctrine. *See* Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1286 (1979) ("Judges reason that once the Supreme Court has initially invested the time to consider the merits, or even write a full-blown opinion, it will not allow lower courts to arrive at a decision after remand with which the Court disagrees. Consequently a denial of certiorari, at the very least, may be thought to demonstrate that the Justices have no strong disagreement with the second lower court decision.").

Review of the due process question in this case and overruling *Vlandis v. Kline* are necessary to avoid lower court confusion on the condition of the irrebuttable presumption doctrine. The doctrine has outlived any usefulness it ever had, and the Court should take this opportunity to lay it to rest.

IV.

THE LOWER COURTS' ORDERING OF RETROACTIVE TUITION REFUNDS VIOLATES THE ELEVENTH AMENDMENT AND IS IN CONFLICT WITH DECISIONS OF THIS COURT.

It is apparent that the district court on remand from this Court reached out to decide the irrebuttable presumption question for the 1976-78 period, to construe the June 28, 1978, clarifying resolution as a retroactive substantive policy change, and to reaffirm its July 1976 order solely to enable the international bank students to claim refunds to in-state tuition from the State of Maryland. However, the district court's handling of the refund issue, as well as the endorsement of the Fourth Circuit, cannot be squared with the terms of the August 1976 stay order, the eleventh amendment to the Constitution, or common sense.

First, the July 13, 1976, district court order was effectively vacated when this Court vacated the judgment of the court of appeals on April 30, 1979. Moreover, as a legal and practical matter, the old district court order could not exist at the same time as that court was assuming jurisdiction to decide again the irrebuttable presumption issue. *See Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936) (appellate court could not leave in effective operation the final decree of the district court and at the same time reinvest that court with jurisdiction to retry the case). At that point, the old order was a nullity and the University's in-state policy was presumably (and in the petitioners' view, in fact) constitutional. By entering a new order in 1980 reaffirming the 1976 order and expressly mandating retroactive refunds, the lower court was obviously trying to circumvent the eleventh amendment's ban on the award of monetary relief against the state. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977).

Second, the lower courts compounded their error and the violation of the State's eleventh amendment rights by ordering retroactive monetary relief for the post-June 23, 1978 period, even though the in-state policy had been declared constitutional on due process grounds after that date (App. 28a), 480 F. Supp. at 1125, and was not declared unconstitutional on different grounds until May 30, 1980. Although styled a reaffirmation of the 1976 order, the May 30, 1980, order for the first time required relief on the basis of two issues not decided until 1980 (one of which — the supremacy clause question — had not even appeared in the initial complaint).

Third, although the University was willing to make refunds as a condition of obtaining the stay of August 3, 1976, this can be regarded as a waiver of eleventh amendment immunity *only* to the extent indicated, i.e., refunds would be made if "the Court's Order of July 13, 1976, were finally affirmed on appeal" (App. 100a). *See Edelman v. Jordan*, 415 U.S. at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1908).").

Clearly, the terms under which refunds would be available under the stay order were not met. The University was successful in this Court and the judgment of the court of appeals and the 1976 order were vacated. In fact, the 1976 order has never been — and never can be — "finally affirmed on appeal." Moreover, the University's understanding of the terms of 1976 stay is consistent with the view the court of appeals took in 1977 when it stayed its mandate pending the University's filing of a petition for certiorari. That stay order was entered "on the same terms as the district court originally granted its stay namely that should the appellant's petition for writ of

certiorari prove unsuccessful" refunds would be available to eligible students (App. 104a). It is apparent that in light of the history of the *Moreno* litigation and the plain language of the stay order, the University has not waived its eleventh amendment immunity. For this additional reason, review of the judgment of the court of appeals is appropriate.

CONCLUSION

This case raises novel and important questions of constitutional law that transcend the huge amounts of money at stake for public colleges and universities across the nation. Moreover, it presents a suitable vehicle for review and resolution of several open constitutional questions, including whether strict scrutiny equal protection analysis should be applied when nonimmigrants receive diminished economic benefits from a State and whether irrebuttable presumption due process analysis should continue to be employed. As demonstrated by the decisions below, answers to the questions raised by this petition are needed to prevent the lower federal courts from continuing to stray from the principles that have guided this Court's recent decisions. For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit to review the judgment it entered in this case on March 26, 1981.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens 172a

OPINION
(Filed March 26, 1981)

No. 80-1400

United States Court of Appeals, Fourth Circuit

Juan Carlos MORENO; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr., Appellees,

v.

UNIVERSITY OF MARYLAND, and John S. Toll, President, University of Maryland, Appellants.
(645 F.2d 217 (4th Cir. 1981))

Argued Jan. 8, 1981

Decided March 26, 1981

Before WINTER, RUSSELL, and ERVIN, Circuit Judges.

PER CURIAM:

The President of the University of Maryland appeals from the judgment of the district court ordering him to permit plaintiffs to demonstrate their entitlement to "In-State" status for purposes of tuition and other fees charged by the University and to refund the difference between the "Out-of-State" tuition and fees actually paid by plaintiffs and the "In-State" tuition and fees they would have paid had they been permitted to demonstrate their entitlement thereto since July 13, 1976, the date of the district court's original judgment in their favor. We affirm.

I

Plaintiffs represent a class of individuals holding "G-4" visas who attend the University of Maryland. The named plaintiffs are dependents of foreign national employees of the Inter-American Development Bank and the International Bank for Reconstruction and Development. Employees of these development banks and other international organizations, together with their immediate families, are classified as nonimmigrant aliens in this country under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976). Unlike most nonimmigrant aliens, employees of international organizations often reside permanently in the United States; the development banks, for example, are headquartered in Washington, D.C. Plaintiffs reside in the Maryland suburbs of Washington. Unlike most aliens holding immigrant visas, employees of international organizations are exempt from federal and state income taxation, either by treaty (*e. g.*, Agreement Establishing the Inter-American Development Bank art. XI, § 9(b), [1959] U.S.T. 3029, T.I.A.S. No. 4397; Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 9(b), 60 Stat. 1440, T.I.A.S. No. 1502 (1945)), or by statute, 22 U.S.C. § 288 (1976). The exemption, however, applies only to "salaries and emoluments" paid by the international organizations. The plaintiffs are subject to federal and state taxation on all other income and to federal, state and local excise, motor vehicle, real estate, retail sales and other taxes and charges.

At the time plaintiffs originally brought this suit in 1975, the University of Maryland had a policy of charging "Out-of-State" students higher tuition and other fees than it charged "In-State" students. It based the determination of "In-State" status on the student's showing of Maryland "domicile." The policy was phrased such that plaintiffs, despite their Maryland residency, could not establish Maryland "domicile," because they were nonimmigrant aliens. Plaintiffs challenged the policy in the district court pursuant to 42 U.S.C. § 1983 (1976) on the grounds that it

denied them due process of law and equal protection under the fourteenth amendment and that it interfered with federal prerogatives over international agreements and immigration in violation of the Supremacy Clause of article VI.

The district court granted summary judgment to the plaintiffs on July 13, 1976. Following *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), it held that the University's policy of denying "In-State" status to "G-4" nonimmigrant aliens created an "irrebuttable presumption" inconsistent with due process of law because the presumption that the plaintiffs could not establish Maryland "domicile" was not universally true and because University officials refused to permit the plaintiffs to prove "domicile." The court ordered the University officials to allow students with "G-4" visas to demonstrate Maryland "domicile" and thereby to qualify for "In-State" status. It reserved for plenary consideration the question of whether in fact the named plaintiffs could establish "domicile," and determined that it need not consider the plaintiffs' equal protection and Supremacy Clause claims in view of the due process basis for relief. *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976).[1]

The University president obtained a stay of the district court order pending appeal. In lieu of granting "In-State" status to students with "G-4" visas who could demonstrate Maryland "domicile," the University agreed to refund the difference between the "Out-of-State" tuition and fees the students would actually pay and the "In-State" tuition and

[1] In accordance with *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the court dismissed the claim against the University itself, holding it to be an agency of the State of Maryland. Plaintiffs did not appeal this dismissal, so we have no occasion to decide whether the University can be sued under § 1983. *Cf. Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Long v. Richardson*, 525 F.2d 74, 77 (6 Cir. 1975).

fees they would have paid "but for the stay" in the event the district court's order "were finally affirmed on appeal."

We affirmed the district court's order without opinion, *Moreno v. Elkins*, 556 F.2d 573 (4 Cir. 1977), and the University president sought and obtained a writ of certiorari from the Supreme Court. On the merits, the Supreme Court stated that if the plaintiffs could establish Maryland "domicile," *Vlandis v. Kline* would control, and the Court would have to overrule that case to deny them relief. It declined to do so, choosing instead to obtain a possibly dispositive authoritative interpretation of state law. The Court held that federal law did not prevent a "G-4" nonimmigrant alien from establishing "domicile" in this country, and that state law would thus determine the issue. In the absence of Maryland precedent, the Court certified the question of whether Maryland law prohibited "G-4" nonimmigrant aliens from establishing Maryland "domicile" to the Court of Appeals of Maryland. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978).

The Court of Appeals of Maryland answered the question in the negative. It held that neither the exemption from state income taxation enjoyed by "G-4" aliens nor their inability to vote in state elections precluded them from becoming domiciled in Maryland, particularly in view of the Supreme Court's express holding that "G-4" aliens could establish permanent residence in the United States. *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979).[2]

While the case was pending before the Maryland court, the University Board of Regents purported to "clarify" its "In-State" status policy by passing a resolution on June 23, 1978, precluding nonimmigrant aliens from qualifying for "In-State" status. The Supreme Court, supplementing its earlier opinion, recognized that the resolution "fundamentally altered the posture of the case," raising new constitutional issues. It remanded the case to the district

[2] John S. Toll replaced Wilson H. Elkins, the original defendant, as President of the University of Maryland on July 1, 1978.

court "for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." *Toll v. Moreno*, 441 U.S. 458, 461-62, 99 S. Ct. 2044, 2045-46, 60 L. Ed. 2d 354 (1979).

II

[1] On remand, the district court first reviewed the status of the due process issue in the case. It concluded that the Supreme Court's original decision in *Elkins* and the Maryland Court of Appeals' decision in *Toll* established plaintiffs' ability to prove Maryland "domicile." The University's policy prior to June 23, 1978, thus created an impermissible irrebuttable presumption, denying due process of law to the plaintiffs. The district court further held that the University's policy after that date, expressed in the Board of Regents' resolution, no longer created an irrebuttable presumption, because under the University's more restrictive definition, nonimmigrant aliens could never prove "domicile" and qualify for "In-State" status. *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979). For reasons sufficiently stated in the opinion of the district court, we agree that the University's "In-State" status policy denied due process of law to the plaintiffs prior to June 23, 1978.

III

[2] The district court then considered the University's policy after June 23, 1978, challenged by plaintiffs on the equal protection and Supremacy Clause grounds deferred previously by the court. Applying strict scrutiny to the suspect classification of nonimmigrant aliens, the district court held that the University could not advance an interest sufficiently substantial to justify the policy, and that the application of the policy to plaintiffs denied them equal protection of the laws. The court also held that the policy constituted state interference with the federal prerogative over immigration in violation of the Suprema-

cy Clause. *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980). For reasons sufficiently stated in this opinion of the district court, we agree that the University's "In-State" status policy before and after June 23, 1978, is invalid under the Constitution and that the plaintiffs are accordingly entitled to relief.

IV

The district court reaffirmed its order enjoining the University president from enforcing the "In-State" status policy as applied to plaintiffs and directing him to permit students with "G-4" visas to demonstrate Maryland domicile. It also ordered the University president to refund the difference between the "Out-of-State" tuition and fees actually paid by those students who could have demonstrated entitlement to "In-State" status since July 13, 1976, the date of the original district court order, and the "In-State" tuition and fees they would have paid had the University not unconstitutionally applied its "In-State" policy to "G-4" nonimmigrant aliens. The refund was ordered pursuant to the University's agreement to pay the tuition and fees differential when it obtained a stay of the original district court order of July 13, 1976, pending appeal.

[3] The University now argues that this refund violates the eleventh amendment because it represents retrospective relief requiring the payment of state funds. It cites and relies upon *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and *Jaqnandan v. Giles*, 538 F.2d 1166 (5 Cir. 1976), *cert. denied*, 432 U.S. 910, 97 S. Ct. 2959, 53 L. Ed. 2d 1083 (1977). Those cases recognize, however, that a state can waive its eleventh amendment immunity. The University did so explicitly in this case by agreeing to pay the refunds when it obtained the stay of the original district court order.

[4] The University now contends that the original order was vacated, thus freeing it from its obligation. The Supreme Court, however, only vacated the judgment of this court in order to remand the case to the district court for consideration of the "new issues of constitutional law" raised by the policy change promulgated in the Board of Regents' resolution of June 23, 1978. *Toll v. Moreno*, 441 U.S. at 462, 99 S. Ct. at 2046. Contrary to the University's contention, the district court had continuing jurisdiction over this suit because it expressly did not resolve all the issues in the litigation by its original order. The Supreme Court could not have simply affirmed the original order because it provided for injunctive relief possibly no longer relevant in view of the Board of Regents' resolution. This change in the posture of the case was attributable solely to the action of the University. It should not, therefore, provide a basis for excuse of the University's obligation to refund tuition and fee differentials agreed to in order to prevent immediate implementation of the relief ordered by the district court. The price the University paid to stay the injunction of its constitutionally invalid policy was waiver of its eleventh amendment immunity. It has failed to vindicate that policy, so it must pay the refunds to which it agreed.

AFFIRMED.

ORDER

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr.;

Appellees,

versus

University of Maryland,

and

John S. Toll, President, University of Maryland,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, District Judge.

(Filed April 15, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II
Clerk.

ORDER

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr.;

Appellees,

versus

University of Maryland,

and

John S. Toll, President, University of Maryland,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, District Judge.

(Filed May 11, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, June 15, 1981, pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno, et al,

Appellees,

versus

University of Maryland and
John S. Toll, etc.,

Appellants.

ORDER

(Filed June 9, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this court within the time allowed by law or order of Supreme Court.

For the Court — By Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

United States District Court,
D. Maryland.

Juan Carlos MORENO et al., Plaintiffs,

v.

John S. TOLL, President, University of Maryland, Defendant.

(480 F. Supp. 1116 (D. Md. 1979))

Civ. A. No. M-75-691.

MEMORANDUM

(Filed October 31, 1979)

JAMES R. MILLER, Jr., District Judge.

I. Statement of Facts

This case was initially filed as a class action by three named plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg seeking declaratory and injunctive relief against the University of Maryland and Dr. Wilson H. Elkins, then president of the University. The plaintiffs sought relief for themselves and for others similarly situated from the University of Maryland's "In-State Policy" which prohibited non-immigrant aliens from establishing in-state student status at the University. The plaintiffs claimed that this policy was invalid in that it created a constitutionally impermissible irrebuttable presumption which denied them due process of the law, and that it violated the Equal Protection Clause of the Constitution.

The policy in question was adopted by the Board of Regents of the University of Maryland, effective January 1, 1974. This policy creates two classes of students, "in-state" and "out-of-state", for purposes of considerations

for admissions, tuition rates, and charge differentials. The relevant provisions of the policy are as follows:

"General Policy"

"1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to *immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States,* in the following cases:

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester. (Emphasis added).

* * * * * * *

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.

* * * * * *

"Definitions"

"1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

"4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland.

For purposes of this policy only one domicile may be maintained at a given time . . ."

There are eight criteria which the University takes into consideration in determining whether Maryland domicile has been established by the relevant person. These criteria are whether the individual:

a. Owns or rents and occupies real property in Maryland as his (her) domicile on a year-round basis.

b. Maintains a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintains within the State of Maryland all or substantially all personal possessions.

d. Pays Maryland income tax on all earned income including taxable income earned outside the State.

e. Registers all owned motor vehicles in Maryland.

f. Possesses a valid Maryland driver's license, if licensed.

g. Registers to vote in Maryland, if registered.

h. Gives a Maryland home address on federal and state income tax forms.

In the present case, the three named plaintiffs were students at the University of Maryland, College Park Campus. Each was financially dependent upon a parent who was in the country on a G-4 visa.[1] In each case the University determined that these plaintiffs were not

[1] 8 U.S.C. § 1101(a)(15)(A) through (L) provides the definitions of the various classifications of nonimmigrant aliens. Subsection (G), applicable in this case, provides as follows:

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) accredited resident members of the staff of

entitled to "in-state" status. This ruling was initially predicated upon the University's belief that holders of G-4 visas were incapable of forming the requisite intent to become Maryland domiciliaries. All three plaintiffs unsuccessfully challenged this ruling through the University's appellate process in an attempt to show that they were, in fact, Maryland domiciliaries.[2] The plaintiffs then filed suit in this court.

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such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

[2] The pertinent facts regarding these plaintiffs are as follows:

Plaintiff Moreno's parents are both citizens of Paraguay and holders of G-4 visas, as Moreno had worked for the Inter-American Development Bank for 14 years as of the time this suit was filed. The Morenos have owned a home in Maryland since 1963; both parents are licensed to drive in this State and their vehicle is registered here. Plaintiff Moreno is also licensed to drive in Maryland. Plaintiff Moreno filed tax returns in both the United States and Maryland in 1973 and 1974.

Plaintiff Otero's father is a citizen of Bolivia, also in the country on a G-4 visa and working in the Inter-American Development Bank; Mrs. Otero is a United States citizen. The Oteros moved to Maryland and have owned a home here since 1965.

Both the Oteros and their son are licensed to drive in Maryland; their vehicle is registered in Maryland. Plaintiff Otero filed both United States and Maryland tax returns in

II. History of the Case

On July 13, 1976, this court filed an opinion in this case following a hearing on motions by both parties for summary judgment. *Moreno v. University of Maryland,* 420 F. Supp. 541 (D. Md. 1976). At that time the defendant University of Maryland was dismissed from this action since it was held not to be a "person" within the meaning of 42 U.S.C. § 1983. This court also granted plaintiffs' motion to certify this matter as a class action. The court then held:

> "That the 'In-State Policy' of the University of Maryland which denies to G-4 aliens by the use of an irrebuttable presumption of non-domicile the opportunity to establish 'in-state' status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment, and (6) [t]hat defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's 'In-State Policy' with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differential determinations." Id. at 565.[3]

1972, 1973 and 1974. Plaintiff Otero applied to have his visa status changed to that of an immigrant.

Plaintiff Hogg's parents are citizens of the United Kingdom and holders of G-4 visas. Mr. Hogg has been employed by the International Bank since 1962. The Hoggs moved to Maryland in 1970 and own a home in the state. The Hoggs and their daughter are licensed to drive in Maryland, and their vehicle is registered there. The Hoggs paid taxes to both the United States and Maryland on income other than Mr. Hogg's salary. Plaintiff Hogg also filed tax returns in 1973 and 1974.

All three families have paid state and local retail taxes, real estate taxes, vehicle, fuel, excise and other taxes. The plaintiffs' complaint states an intent, both on the part of the plaintiffs and their families, to remain in Maryland indefinitely.

[3] It should be noted that these provisions of the court's original order were stayed, pending appeal, on condition that, in the event the appeal was unsuccessful, the University agreed to

Defendant appealed and the Court of Appeals for the Fourth Circuit affirmed the district court decision 556 F.2d 573 (4th Cir. 1977). The Supreme Court granted certiorari 434 U.S. 888, 98 S. Ct. 260, 54 L. Ed. 2d 173 (1977), to consider whether this decision conflicted with the decision in *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

The Supreme Court, in addressing this case, initially held that "the federal constitutional issues in this case cannot be resolved without deciding an important issue of Maryland law." It therefore certified the question of state law to the Maryland Court of Appeals. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978).

In its consideration of the case, the Supreme Court concluded that "the gravamen of [the] dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland [since the] University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland." *Id.* at 658-659, 98 S. Ct. at 1345.[4] Accordingly the Court found this case to be "squarely within *Vlandis*[5] as limited by *Salfi*[6] to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile]

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refund the difference between "out-of-state" and "in-state" charges assessed to eligible students with G-4 visas enrolled in the University in the semester commencing in the Fall of 1976 or any semester thereafter.

[4] See *Elkins v. Moreno*, 435 U.S. 647 at 659 n.8, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978) for the Supreme Court's summary of the defendant's insistence that this case is governed by the Maryland law of domicile.

[5] *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 39 L. Ed. 2d 63 (1973).

[6] *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

the opportunity to show factors clearly bearing on that issue.' "*Id.* at 660, 98 S. Ct. at 1346, quoting *Weinberger v. Salfi*, 422 U.S. at 771, 95 S. Ct. 2457. The Court found it unnecessary to review the *Vlandis* rationale, given the posture of the case.[7] Accordingly, the Court certified the following question to the Maryland Court of Appeals:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Id.* 435 U.S. at 668-669, 98 S. Ct. at 1351.

The Supreme Court upheld the conclusion of this court, as a matter of federal law, that G-4 aliens are not precluded from acquiring domicile in their state of residence. *Id.* at 665-667, 98 S. Ct. 1338.

Mr. Justice Rehnquist, joined by Chief Justice Burger, filed a dissent in this action based on his conclusion that the due process issue could be decided without resolving the question of Maryland domicile law. The dissent contended that domicile was not the sole criterion looked upon by the University in this case.[8] Rather, domicile and

[7] The Court found no necessity to review the Constitutional principles since the issue could apparently be avoided given either a positive or negative response by the Maryland Court of Appeals. If a G-4 alien were found to be incapable of obtaining domicile in Maryland, then any "irrebuttable presumption" would be universally true and therefore would present no constitutional issue. If, however, G-4 aliens were found to be capable of acquiring domicile in Maryland the Court found that the University "apparently ha[d] no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it ha[d] indicated both [there] and [here] that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens [could] have the requisite intent." *Elkins v. Moreno*, 435 U.S. at 661, 98 S. Ct. at 1347.

[8] The dissent contended that, under the applicable University policy the criteria initially examined are whether the student is either a "United States citizen" or an "immigrant alien lawfully admitted for permanent residence." If the student satisfied these

other factors, including cost equalization, were reasons for the University's determination that nonimmigrant aliens should not be accorded the benefits given under the in-state policy to citizens and immigrant aliens domiciled in the state. Accordingly, the dissent maintained that this case does not fall squarely within the decision in *Vlandis v. Kline*.[9] *Id.* at 675, 98 S. Ct. 1338. This dissent maintained that the constitutional issues are controlled by *Weinberger v. Salfi, supra* at note 5, and accordingly concluded that the state law question need not be certified in order to resolve the due process issues presented.

Following the Supreme Court decision, the Court of Appeals of Maryland addressed the certified question of whether or not G-4 aliens are precluded by state law from acquiring domicile in Maryland. *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979). The court held that nothing in the general Maryland law of domicile renders G-4 visa holders, or their dependents, incapable of becoming domiciled in Maryland. The court, however, noted that the defendants' posture in presenting this question had altered significantly since the Supreme Court's decision in this case. The Court of Appeals referred to this as an apparent attempt by the defendants to adopt the dissent's contention that the Maryland law of domicile is not determinative of this case, despite prior assertions to the contrary. Consistent with the defendants' altered view, the Board of Regents of the University passed a resolution on June 23, 1978 declaring in part that:

> "The Board of Regents deems its statutory authority under the laws of Maryland to include the power, right, or privilege to adopt a more restrictive definition of domicile for purposes of according in-state

initial criteria, the University then addressed the question of domicile. *Elkins v. Moreno*, 435 U.S. at 670, 98 S. Ct. at 1351.

[9] *Vlandis v. Kline* held that where a State "purport[s] to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue." *Weinberger v. Salfi*, 422 U.S. at 771, 95 S. Ct. at 2470 (citing *Vlandis v. Kline*, 412 U.S. at 452, 93 S. Ct. 2230).

status for admissions, tuitions, and charge differentials than may be applicable generally or otherwise under the Maryland common law."

The Court of Appeals did not address this contention, as it was beyond the scope of the question certified for its consideration. *Id.* at 434, 397 A.2d 1013.

Following the decision in the Court of Appeals, the defendants attempted to restore this case to the active docket of the Supreme Court. The Supreme Court initially took note of the June 23, 1978 statement of the Board of Regents of the University of Maryland entitled "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admissions, Tuition, and Charge-Differential Purposes, insofar as It Denies In-State Status to Nonimmigrant Aliens."[10] This statement, pur-

[10] The full text of the statement provides as follows:

"Purposes and Interests of In-State Policy. The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

"(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

"(b) achieving equalization between the affected classes of the expense of providing educational services;

"(c) efficiently administering the University's in-state determination and appeals process; and

"(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

"Reaffirmation of In-State Policy. Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland, common law, the Board of Regents reaffirms that policy because it intends and

porting to reaffirm the University's policy regardless of whether or not it conforms with the Maryland law of domicile, runs counter to the Supreme Court's original premise that the University would re-draft its policy to accommodate G-4 aliens were the Maryland courts to hold them capable of acquiring domicile.[11] Upon noting this, the Supreme Court held that if domicile is not the "paramount" policy consideration, then this case no longer falls squarely within *Vlandis* as limited by *Salfi*,[12] and accordingly the new constitutional issues raised by the clarifying resolution should be considered in the first instance by this court. *Toll v. Moreno*, ___ U.S. ___, 99 S. Ct. 2044, 60 L. Ed. 2d 354. Thus the case is before this court on remand from the Supreme Court for "consideration in light of [the] opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and The Board of Regent's Clarifying Resolution of June 23, 1978."

II. Present Posture of the Case

This action is now before the court for an initial determination of what issues remain to be resolved. Pursuant to the court's request, both parties have filed memoranda outlining their respective positions regarding the effect which the clarifying statement of the Board of Regents has had on this case along with their views regarding the identity of the other issues which remain for the court's decision. After having examined the briefs, the court has concluded that an oral hearing on this matter now before it is not necessary. Local Rule 6.

The plaintiffs initially contend that the following three issues still remain in this case:

1. Whether the University's in-state policy violates the Equal Protection Clause of the Constitution;

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deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above."

[11] *See, Elkins v. Moreno*, 435 U.S. at 660, 98 S. Ct. 1338.

[12] *See*, notes 6-7, *supra*.

2. Whether the policy still creates an unlawful irrebuttable presumption as construed by *Vlandis v. Kline*; and

3. Whether the policy violates the Supremacy Clause of the Constitution.

The University's response details its position that the issue of cost equalization, as highlighted by the Board of Regent's clarifying resolution. is not new to this case but has been advanced by the defendants throughout the history of this litigation. The defendants contend that the Supreme Court decision in *Moreno v. Toll, supra,* has effectively removed the irrebuttable presumption issue from this case.

The plaintiffs' response is that the defendants' position throughout this litigation, up to the point of certification to the Court of Appeals, was that the Maryland law of domicile was the controlling question in this case. Plaintiffs maintain that the cost equalization arguments raised in the course of this litigation were presented as a rationalization of interests served by the policy. The plaintiffs further maintain that the irrebuttable presumption issue has not been removed from the case by the Supreme Court's decision but rather its continued viability is one of the issues remanded for this court's consideration.

A. The Irrebuttable Presumption Issue

1. The Effect of the Supreme Court's Rulings

[1] The first issue which this court must address is that of whether or not the second Supreme Court opinion removed the irrebuttable presumption issue from this case. Counsel have filed radically different readings of the relevant portions of the Supreme Court opinion, with plaintiffs' counsel maintaining that this issue remains viable and defendants' counsel contending that the "law of the case" is that this issue has been removed from the case.

In my judgment, the correct interpretation of the Court's second decision can only be obtained by reading it in

conjunction with the Court's earlier opinion in *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978). The Court clearly premised its treatment in the earlier case on two factors: "Because petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* . . ." *Id.* at 660, 98 S. Ct. at 1346. The Court based this treatment on its finding that "the gravamen of [the] dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland. [Since the] University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland." *Id.* at 658-659, 98 S. Ct. at 1345.

Subsequent to this Supreme Court decision, the Board of Regents of the University adopted its "clarifying" resolution. This resolution advanced the interest of cost-equalization as a factor in the in-state policy. Further, the resolution reaffirmed the existing policy, irrespective of whether or not it was ultimately found to conform with the Maryland law of domicile. This position clearly altered the posture upon which the first Supreme Court decision was premised.

Turning now to the Supreme Court decision, *Toll v. Moreno*, 441 U.S. 458, 99 S. Ct. 2044, 60 L. Ed. 2d 354 (1979), we find the court saying:

> ". . . the Board of Regent's Clarifying Resolution has fundamentally altered the posture of the case. [The] decision in *Elkins* rests on the premise that 'the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G-4 aliens

> were the Maryland courts to hold that G-4 aliens can acquire such domicile. [435 U.S. at 661]. After the Clarifying Resolution, this premise no longer appears to be true. And if domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . [*Id.*, at 660, 98 S. Ct. 1338.]' " 99 S. Ct. at 2045-2046.

Read in context, this decision does not "remove the irrebuttable presumption issue from the case entirely." (Defendant's Memo at 11). Rather, the Supreme Court ruling holds that, since the University has indicated it no longer plans to re-draft the in-state policy in response to the decision of the Maryland Court of Appeals to the effect that G-4 aliens can acquire Maryland domicile, it is no longer apparent that domicile is the paramount consideration of this case. *If* domicile is not the paramount consideration, then this case is no longer governed by *Vlandis* as limited by *Salfi*. The Supreme Court did not conclusively rule on this point; rather it is one of the issues remanded to this court for determination.

2. Is Domicile Now the "Paramount" Policy Consideration?

The next question which must be addressed is that of whether or not domicile is the paramount policy consideration in this case. Counsel for both parties have filed detailed memoranda citing instances in the lengthy history of this case in which the defendants, through counsel, discussed the basis of the in-state policy. Plaintiffs' counsel lists various occasions upon which the defendants maintained that domicile was the central issue; defendants' counsel has countered with references to instances in which cost equalization justifications were raised and discussed. This matter cannot be resolved, however, by a comparison of out of context references to statements by the defendants, but rather must be examined in light of the actual policy statement, the clarifying resolution, and the overall case history.

The plain wording of the in-state policy provides that the University will grant in-state status to "United States citizens, and to immigrant aliens . . ." who have been "domiciled" in Maryland, for six months, or, in the case of a dependent student, whose parent or spouse has been domiciled in the state for six months. Thus, as noted by Mr. Justice Rehnquist in his dissent in *Elkins*,[13] and as now advanced by the defendants, the initial hurdle in an in-state status determination is a showing of United States citizenship or immigrant alien status. Absent citizenship or immigrant status, the University does not even reach the question of domicile. The dissent, and now the defendants, contend that what this policy does is to classify nonimmigrant aliens as out of state students for a variety of reasons, one of which is the University's belief that these nonimmigrant aliens lack the capacity to become Maryland domiciliaries. Other reasons would include the rationale of cost equalization. Thus the dissent concludes that there is no irrebuttable presumption based on *domicile* since the initial determination of eligibility for in-state status hinges on a showing of citizenship or immigrant status, and the plaintiffs may present any relevant evidence on that point.

Despite the logical appeal of this argument, it is apparent that the overall goal of the University's In-State Policy is to grant admission, tuition, and charge differential benefits to Maryland domiciliaries. The present policy precludes nonimmigrant aliens from consideration for these benefits. The question that must initially be addressed, according to the remand from the Supreme Court in *Toll*, is whether the domicile issue is the "paramount" concern of the University in this case in order to determine whether this policy establishes an irrebuttable presumption precluded by *Vlandis* as limited by *Salfi*.

Despite the defendants' present assertion to the contrary, it is apparent that up until the time of certification

[13] *See, Elkins v. Moreno, supra*, 435 U.S. at 669-676, 98 S. Ct. 1338.

of the domicile issue to the Maryland Court of Appeals, the position of the defendants had been that domicile was the chief issue. This posture was noted by the Supreme Court in *Elkins* in stating that the University "makes domicile the 'paramount' policy consideration." On certification to the Court of Appeals, however, the defendants shifted their position. The clarifying resolution plainly states that the University will not change its policy even given an adverse decision on the Maryland law of domicile. Thus, domicile cannot now really be the paramount issue, since the University has now unquestionably stated that it doesn't feel that it is bound by rulings of the Maryland Court on the law of domicile, but rather is free to define domicile in a more restrictive manner if it so chooses. The defendants' position is that domicile, as defined by the applicable Maryland law, is not now the real concern of the in-state policy.

Both parties have devoted considerable attention in their memoranda to the question of whether or not cost equalization has been advanced by the defendants as a consideration in the University's policy. This is not the precise point which needs to be addressed according to the mandate inherent in the Supreme Court's remand. The question now put before me is whether or not the law of *domicile*, as the term was previously presumed to be defined by the Maryland law of domicile, is the paramount consideration in the University's policy. The clarifying resolution of the University indicates that this is not the position presently taken by the University, in that it now claims the right to construe domicile more narrowly in order to suit its purposes, one of which is cost equalization.

[2] Clearly the University is not bound to use the concept of domicile, as defined by state law, in fashioning its tuition policy. The University, through the Board of Regents, is granted broad general powers by the State to administer and manage the operation of the school in such areas as admission, tuition, and fee policies. *Md. Ed. Code Ann.* § 13-104. While this court does not question the University's authority to act in this fashion, I must

address the effect of its having done so at this late stage in the litigation.

Although the resolution in question is entitled a "clarifying" resolution, it does not clarify but rather alters the University's position on domicile.[14] Under the resolution the University is no longer concerned with the Maryland law of domicile, but rather with its own more limited use of that term.

3. What retroactive effect, if any, should be given the policy change?

[3] The initial policy in question was adopted in September, 1973. The ruling by this court was filed on July 13, 1976, granting injunctive relief to the plaintiffs. That order was stayed, however, pending final outcome on appeal on condition that, should the plaintiffs ultimately prevail, the University would refund to them the difference between in-state and out-of-state charges paid.[15]

The defendants maintain that the plaintiffs' rights have not been adversely affected by the University's change in position and that giving the "clarifying" resolution retroactive effect will not impair the plaintiffs' rights. Defendants base this contention on their perception that the order staying this court's initial injunction order made the plaintiffs' eventual right to any monetary recovery contingent upon a final decision in their favor. Since no final ruling has been entered for the plaintiffs, the defendants claim the plaintiffs have no right to any compensation and will not be prejudiced if the University's regulation is given retroactive effect.

[14] In *Elkins v. Moreno, supra,* at 659, n.8, 98 S. Ct. 1338, the Supreme Court sets out instances in the history of this case up to that point in which the defendants indicated that the basis of the policy was the law of domicile as established and applied by the Maryland courts.

[15] This would still be contingent upon a showing by the individual plaintiff that he or she was, in fact, a domiciliary of Maryland.

The court is not persuaded by the defendants' argument on this point. Until June 23, 1978, the date of the "clarifying" resolution, the purported concern of the University was with the Maryland law of domicile. Given this premise, the Supreme Court found this case to be squarely within *Vlandis* as limited by *Salfi*. *Elkins v. Moreno, supra,* at 660, 98 S. Ct. 1338. Two matters remained for the Supreme Court's decision at that time:

1. Whether, as found by this court, G-4 aliens could be domiciled in Maryland according to state law; and, if this were possible,

2. Whether the court would further limit or overrule *Vlandis* on the facts of this case.

On certification the Maryland Court of Appeals held that G-4 aliens could acquire domicile in Maryland under the applicable state law. Given the interim change in the defendants' position in this case, however, the Supreme Court did not address the question of overruling or further limiting *Vlandis*. Until the June 1978 policy change, in-state eligibility hinged upon a determination of Maryland domicile according to *state law* principles. The Court of Appeals of Maryland having now determined that G-4 aliens may be domiciled in Maryland according to state law, the plaintiffs were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the state. The rights of the plaintiffs were asserted and matured under the pre June, 1978 policy. Accepting, as this court must do, that the doctrine of *Vlandis v. Kline, supra,* has not been yet discarded by the Supreme Court, the plaintiffs were denied due process. A change in that policy cannot now retroactively deny plaintiffs the benefits to which they were entitled and which had accrued up to that time. *Greene v. United States,* 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed. 2d 576 (1964); *Coe v. Secretary of H.E.W.,* 502 F.2d 1337 (4th Cir. 1974).

4. Is the post June 23, 1978 policy invalid under the Vlandis v. Kline doctrine?

[4] The question which remains is whether the policy, which now purports to be concerned with the University's narrowly construed definition of domicile, still constitutes an impermissible irrebuttable presumption.

In *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the Court held that a Connecticut statutory definition of "residents" for purpose of fixing tuition at a state university was unconstitutional where the state purported to be concerned with residency yet denied students the opportunity to present facts tending to show they met the test of residency.

In the present posture of this case, the test asserted in the revised In-State Policy is the University's limited definition of domicile, not the generally accepted Maryland law of domicile. The University's definition of the term precludes nonimmigrant aliens from "domiciliary" status. In its present posture, the In-State Policy does not constitute an impermissible irrebuttable presumption. Given the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify for in-state status under that policy. Accordingly, there no longer is an impermissible irrebuttable presumption under the post June 23, 1978 policy.

B. Other Issues

The question still remains whether the revised policy violates the Equal Protection and Supremacy Clauses of the Constitution. A conference will be held with counsel to schedule further proceedings on these points.

United States District Court,
D. Maryland.

Juan Carlos Moreno et al., Plaintiffs,

v.

John S. Toll. President,
University of Maryland, Defendant.
(489 F. Supp. 658 (D. Md. 1980))

Civ. A. No. M-75-691.

MEMORANDUM AND ORDER

(Filed April 17, 1980)

JAMES R. MILLER Jr., District Judge.

This action was filed as a class action challenge[1] to the University of Maryland's "In-State Policy"[2] which precludes non-immigrant aliens from consideration for in-state status while enrolled at the University. The court has already addressed the plaintiffs' due process challenge

[1] The plaintiff class was defined as follows:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa."

Moreno v. University of Maryland, 420 F. Supp. 541, 564 (D. Md. 1976).

[2] The University of Maryland's In-State Policy makes Maryland domicile the test for granting in-state status to citizens and immigrant aliens. The Policy, along with the Board of Regents' "Clarifying Resolution" of June 23, 1978 expressly precludes consideration of eligibility for in-state status in the case of non-immigrant aliens enrolled at the University.

to the policy.[3] Presently pending before the court are cross motions for summary judgment on the remaining issues raised under the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution.

I. The Equal Protection Claims

[1] The plaintiffs' initial argument under the Equal Protection Clause is that the challenged portion of the University's In-State Policy is premised upon a classification based on alienage, and therefore is subject to strict scrutiny in accordance with the Supreme Court decisions in *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973), *Examining Board v. Flores de Otero*, 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976), and *Nyquist v. Mauclet*, 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977). The defendant, however, contends that strict scrutiny is inappropriate on the following bases:

> (1) The previous Supreme Court cases concerning discrimination against aliens in which a strict scrutiny test was applied all involved a statute or practice which allegedly discriminated against *resident* aliens (a term equated by the defendant with *immigrant* alien);

[3] See the district court decision in *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), *aff'd* 556 F.2d 573 (4th Cir.), *cert. granted*, 434 U.S. 888, 98 S. Ct. 260, 54 L. Ed. 2d 173 (1977). The Supreme Court, after hearing argument on the case, certified a question of state law to the Maryland Court of Appeals, prior to entering a final order in the case. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978). Subsequent to the decision by the Maryland Court of Appeals (*Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979)) the Supreme Court remanded the matter to the district court for further consideration due to material changes in the factual posture of the case. *Toll v. Moreno*, 441 U.S. 458, 99 S. Ct. 2044, 60 L. Ed. 2d 354 (1979). On remand, the district court issued an opinion ruling on the remaining due process issues and setting forth the issues remaining for consideration. *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979).

(2) since *immigrant* aliens are eligible for in-state status at the University, it is irrational to contend that the University's policy denies benefits on the basis of alienage;

(3) the rationale for according "suspect" class status is wanting in this case since nonimmigrants can decide to adjust to immigrant visa status;

(4) in-state consideration is not a necessity of life and, therefore, strict scrutiny is inappropriate;

(5) strict scrutiny should not be applicable since the University's policy is consistent with the purposes of federal immigration law; and

(6) in the dissent filed in a prior opinion of the Supreme Court in this case, Justice Rehnquist and Chief Justice Burger indicated that "[t]here . . . would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest." *Elkins v. Moreno,* 435 U.S. 647, 676 n.6 [98 S. Ct. 1338, 1354 n.6., 55 L. Ed. 2d 1338] (1978).

In determining the applicable standard in the present case, it is necessary to review briefly the recent Supreme Court decisions regarding the ability of the State to create legislative classifications on the basis of alienage.

Initially, it is clear that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson, supra,* 403 U.S. at 372, 91 S. Ct. at 1852. Thus, in the *Graham* case, the Supreme Court struck down Pennsylvania and Arizona statutes which denied welfare benefits to resident aliens or to aliens who had not resided in the Univted States for a requisite number of years, as being violative of the Equal Protection Clause. In subsequent cases the Court has expounded upon this doctrine.

For example, in *Examining Board v. Flores de Otero, supra,* Puerto Rico's virtual ban on the private practice of

civil engineering by aliens was held unconstitutional by the Court, stating 426 U.S. at 602, 96 S. Ct. at 2281:

> "[*Graham v. Richardson, supra; Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973); and *In re Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973)] establish that state classifications based on alienage are subject to 'strict judicial scrutiny.' *Graham v. Richardson*, 403 U.S. at 376, 91 S. Ct. at 1854. Statutes containing classifications of this kind will be upheld only if the State or Territory imposing them is able to satisfy the burden of demonstrating 'that its purpose or interest is both constitutionally permissible and substantial; and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.' In *re Griffiths*, 413 U.S. at 721-722, 93 S. Ct. at 2854-2855 (footnotes omitted)."

The Court went on to note that two rationales exist for the principles set forth in these cases.

> "The first, based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment and in the Due Process Clause of the Fifth Amendment, recognizes that '[a]liens as a class are a prime example of a "discrete and insular" minority. . . . for whom . . . heightened judicial solicitude is appropriate.' *Graham v. Richardson*, 403 U.S. at 372, 91 S. Ct. at 1852 . . . The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2, and in the naturalization power. Art. 1, § 8, cl. 4 recognizes the Federal Government's primary responsibility in the field of immigration and naturalization." (Citations omitted.)

426 U.S. at 602, 96 S. Ct. at 2281.

Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977), the Supreme Court held unconstitutional a New York statute which barred certain resident aliens from eligibility for state financial assist-

ance for higher education.[4] The appellants in *Nyquist* sought to avoid strict scrutiny analysis by the Court by arguing that the state statute in question distingushed "only within the heterogeneous class of aliens and [did] not distinguish between citizens and aliens *vel non*." *Id.* at 8, 97 S. Ct. at 2125. Nevertheless, the Court applied strict scrutiny analysis in striking down the statute, as it stated:

> "The important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."

Id. at 9, 97 S. Ct. at 2125.

As previously mentioned, the defendant's initial and principal argument against the application of the doctrine of strict scrutiny here is premised upon the observation that all prior Supreme Court cases cited have dealt with classifications of "resident" aliens, rather than with "non-immigrant" aliens. Accordingly, the defendant argues that nothing in the prior Supreme Court cases requires the application of strict scrutiny in the examination of state discrimination against nonimmigrant aliens. In support of this contention, the defendant refers the court to G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, Sup. Ct. Rev. 275, 312 (1977), wherein the author states:

> "The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens.

[4] The statute in question in *Nyquist v. Mauclet, supra*, provided as follows:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States." N.Y. Educ. Law § 661(3) (McKinney Supp. 1976).

> It has not even suggested that such aliens are within the class protected under the suspect classification doctrine."

Since no case law is cited in support of the defendant's position,[5] the issue of whether state classifications which narrowly discriminate against nonimmigrant aliens should be examined under strict scrutiny analysis appears to present a novel question of law.

In attempting to distinguish the present case from prior Supreme Court decisions which applied strict scrutiny analysis to classifications of "resident" aliens, *See Graham v. Richardson, supra; Sugarman v. Dougall supra; In re Griffiths, supra; Nyquist v. Mauclet, supra,* the defendant appears to adopt a definition of "resident" alien which excludes a nonimmigrant status from its umbrella. This definition, in turn, appears to have its genesis in the article by Professor Rosberg:

> "As defined in the federal immigration laws, a resident- or immigrant-alien is a person admitted for permanent residence, entitled to work and live anywhere in the country and eligible for naturalization after five years of residence. A non-resident- or

[5] The court and the parties have found no case which addresses this issue. The defendant, however, does refer this court to the cases of *Shames v. State of Nebraska,* 323 F. Supp. 1321 (D. Neb. 1971), *aff'd* 408 U.S. 901, 92 S. Ct. 2478, 33 L. Ed. 2d 321 (1972); *DeTenorio v. Lightsey,* 589 F.2d 911 (5th Cir. 1979), *cert. den.* ___ U.S. ___, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979); and *Hernandez v. Houston Independent School District,* 558 S.W.2d 121 (Tex. Civ. App. 1977) in support of his position. These cases, however, are unpersuasive on this particular issue, in that both *Shames* and *DeTenorio* concern state statutes limiting the rights of *nonresident* aliens, *i.e.* those living in foreign countries, to inherit property in the United States, and *Hernandez* deals with a Texas statute denying free education to *illegal* aliens. The defendant also cites *Mathews v. Diaz,* 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976), but that case specifically deals with the rights of Congress to create legislative classifications based on alienage. *Mathews,* therefore, does not address the issue of the state's power to discriminate on the basis of alienage.

> nonimmigrant-alien is a person admitted for a fixed period of time determined prior to entry . . . No amount of residence will make a nonimmigrant eligible for naturalization."

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government, supra* at 277. Under Professor Rosberg's analysis, the terms "immigrant" and "resident" are synonymous, as are the terms "nonimmigrant" and "nonresident". This court, however, has concluded that this definition of these terms is erroneous, both in light of the definitions contained in the Immigration and Nationality Act itself and of usage of the terms in relevant case law.

The Immigration and Nationality Act defines the term "residence" as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1482 and 1484 of this title[6] where there is continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

8 U.S.C. § 1101(a)(33).

Under this definition a "resident" alien is one whose place of general abode is within the United States. Resident aliens can, therefore, be further classified as either "immigrant" or "nonimmigrant", the chief basis for the distinction between the two being the statutory recognition of temporal limits inherent in nonimmigrant status. Immigrant aliens are referred to as being "lawfully admitted for permanent residence", i.e. being "accorded

[6] 8 U.S.C. § 1482 deals with the circumstances under which dual nationals will lose their United States citizenship due to continued residence in a foreign state of birth.

8 U.S.C. § 1484 deals with the circumstances under which a naturalized national may lose his United States citizenship due to continuous residence in a foreign state.

the privilege of residing *permanently* in the United States." 8 U.S.C. § 1101(a)(20). Nonimmigrant aliens, by contrast, are admitted for temporary residence.[7] Nonimmigrant aliens are ineligible to become naturalized citizens, because they are not admitted for permanent residence in accordance with the statutory requirements. *See* 8 U.S.C. § 1427(a). Nonimmigrant aliens may, however, be classified as resident aliens if their principal dwelling place is within the United States.[8] Thus the court

[7] Nonimmigrant aliens do not constitute a homogeneous class. The statute lists 12 separate categories of aliens who qualify for classification as nonimmigrants. See 8 U.S.C. § 1101(a)(15)(A)-(L). Each category accords special immigration treatment to a classification of aliens in recognition of their specialized purpose or function in coming to the United States. Nonimmigrant aliens are exempted from the numerical limitations which are placed upon the entry of immigrant aliens. Accordingly, aliens seeking admission are deemed to be immigrants unless they can prove that they fall within one of the statutorily defined nonimmigrant classifications. 8 U.S.C. § 1184(b).

[8] This proposition is supported by negative inferences derived from Supreme Court cases which have discussed the rights of nonresident aliens. Although the term "nonresident alien" is not specifically defined by statute, the Supreme Court has repeatedly used the term in reference to aliens living outside the United States. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972); *Gorun v. Fall*, 393 U.S. 398, 89 S. Ct. 678, 21 L. Ed. 2d 628 (1969); *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 372 U.S. 24, 83 S. Ct. 611, 9 L. Ed. 2d 557 (1963); *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 80 S. Ct. 785, 4 L. Ed. 2d 812 (1960); *Jay v. Boyd*, 351 U.S. 345, 76 S. Ct. 919, 100 L. Ed. 1242 (1956); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953); *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950); *Commissioner v. Wodehouse*, 337 U.S. 369, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949); *Clark v. Allen*, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947). These cases support this court's conclusion that the terms "resident" and "nonresident" alien as used by the Supreme Court in the past, refer solely to the question of whether the alien is present and dwelling in fact in the United States and not to the alien's status as immigrant or nonimmigrant. 8 U.S.C. § 1101(a)(33).

finds that the term "resident alien", as used in prior Supreme Court decisions dealing with the state's power to classify on the basis of alienage, means those aliens, either immigrant or nonimmigrant, who maintain their place of general abode within the United States.

Given the above definition of "resident alien", the defendant's position presumably is that the prior Supreme Court cases mandate that strict scrutiny analysis be applied in cases of state classifications which discriminate broadly against resident aliens, but that the Court has not yet addressed the question of discriminate classifications of an identifiable subclass of resident aliens, i.e. nonimmigrant aliens.

The chief factor which distinguishes nonimmigrant resident aliens from other resident aliens is that nonimmigrants are admitted only as "temporary" residents of the United States. Accordingly, regardless of the duration of a nonimmigrant's residence in this country, he is ineligible for citizenship unless he changes his visa status to that of an alien admitted for permanent residence, i.e. an immigrant alien. Nonimmigrant aliens, therefore, have a lesser degree of national affinity than immigrant aliens since the former will not, as a matter of course, become eligible for citizenship. This fact, however, is an insufficient justification for allowing the states greater latitude to discriminate against nonimmigrant aliens. As was stated by the Supreme Court in *Nyquist v. Mauclet, supra* 432 U.S. at 10, 97 S. Ct. at 2126:

> "The first purpose offered by the appellants, directed to what they describe as some 'degree of national affinity' . . .[9] is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."

[9] As previously set forth in note 4, the statute under consideration in *Nyquist* only discriminated against resident aliens who had not applied for citizenship, or if not qualified for citizenship, would not submit a statement affirming an intent to become a citizen when qualified.

The fact that nonimmigrant aliens may not acquire citizenship in the United States is a fact which is exclusively controlled by Congress. Therefore, a state has no power to place additional burdens on nonimmigrants solely on the basis of their visa status as dictated by Congress.

The court concludes that the Supreme Court cases cited have in principle wrapped all resident aliens, both immigrant and nonimmigrant, in the suspect classification blanket. The judicial protection accorded to aliens as a suspect class was based upon a recognition that aliens constitute a "discrete and insular minority" for whom "heightened judicial solicitude is appropriate". *See, Graham v. Richardson, supra* 403 U.S. at 372, 91 S. Ct. at 1852. This treatment is seemingly premised on the aliens' minority status in the community, not their potential citizen status. Accordingly, the court believes that existing case law demands that states justify discriminate classifications of resident aliens, whether immigrant or nonimmigrant, under a strict scrutiny standard.[10]

[2] The defendant has presented the court with several additional alternate arguments against the application of strict scrutiny analysis in this case. First, the defendant stresses that the In-State Policy does not discriminate against all aliens,[11] in that it only precludes consideration for in-state status to all nonimmigrant aliens. This fact, however, is unimportant, for as the Court stated in *Nyquist*, the relevant facts in determining that strict scrutiny should apply are that the policy is directed at aliens, albeit only the subclass of nonimmigrant aliens in

[10] The one exception to this principle is the "governmental functions" doctrine which will be discussed *infra* in connection with the Supreme Court decision in *Foley v. Connelie*, 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978).

[11] The mere fact that some aliens do obtain In-State status consideration under the policy does not imply that the policy should not still be subject to strict scrutiny. As *Nyquist* indicated, the test is whether the policy impermissibly discriminates against aliens, not necessarily whether it discriminates against all aliens.

the present case, and that only aliens are harmed by the policy. The subclass of nonimmigrant aliens seemingly constitutes a "discrete and insular minority for whom judicial solicitude is appropriate," *Graham v. Richardson, supra* at 372, 91 S. Ct. at 1852, since their nonimmigrant status is dictated by federal law. *Cf.* 8 U.S.C. § 1101(a)(15).[12]

The defendant also argues that the University's policy harms not only aliens but that it also denies in-state preference to out-of-state students. (*See* Paper 42, p. 4). This argument, however, is unpersuasive since the policy subjects all citizens and immigrant aliens to a domicile test in order to qualify for in-state benefits whereas nonimmigrant aliens are precluded from qualifying under the same test. The fact that one of the effects of the statute is to deny in-state status to out-of-state students is immaterial in determining whether the policy denies equal protection to nonimmigrant aliens who reside within the state. The policy is naturally based on the premise that in-state status should only be granted to persons who reside within the state. The question, therefore, is whether the policy denies equal protection to nonimmigrants as a "discreet and insular" minority of state residents. It appears to do so.

[3] The defendant also seeks to avoid strict scrutiny analysis by claiming that the benefit sought is not a "necessity of life." The defendant cites the recent Supreme Court opinion in *Foley v. Connelie,* 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978). In this context, however, the

[12] The fact that a nonimmigrant alien may opt to adjust his immigration status to that of a permanent alien does not redeem the University's Policy. In *Nyquist,* the statute challenged provided that aliens would be eligible for the educational loans in question if they either applied to become United States citizens or submitted a statement of intent to apply for citizenship when eligible. The *Nyquist* court struck down the statute, despite the fact that those challenging the statute could have qualified for the loans they sought merely by deciding to apply for citizenship. *Nyquist v. Mauclet, supra,* 432 U.S. at 11, 97 S. Ct. at 2126.

defendant's reliance on *Foley* is misplaced. In *Foley*, the Court upheld a New York statute limiting appointment to the state police force to United States citizens by applying a rational basis, rather than a strict scrutiny, test. The application of this less demanding standard, however, was clearly limited to alienage classifications in matters involving the state's "historical power to exclude aliens from participation in its democratic political institutions." *Id.* at 295, 98 S. Ct. at 1070. As the Court stated:

> "The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."

Id. at 297, 98 S. Ct. at 1071. The defendant would have the court construe this statement to mean that strict scrutiny should only apply to the "necessities of life", such as those indicated. Taken in context, however, it is apparent that the case stands for a limited exception to the general strict scrutiny standard, and that the exception will apply only in cases involving state regulation of one of the basic functions of government. This meaning is apparent in light of the Court's later decision in *Ambach v. Norwick*, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979), where it stated:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

Id. at 75, 99 S. Ct. at 1593. Thus the strict scrutiny approach is generally applicable to State classifications based on alienage, excepting those dealing with governmental functions in which cases the less stringent rational basis test will be applied.

Given the above considerations, the Court finds that strict scrutiny is the applicable test in examining the constitutionality of the University's In-State Policy.[13] Accordingly, the statute may be upheld only if the defendant satisfies the burden of demonstrating that:

> "[the policy's] purpose of interest is both constitutionally permissible and substantial, and that [the State's] use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest."

Examining Board v. Flores de Otero, supra, 426 U.S. at 602, 96 S. Ct. at 2281 (citing *In re Griffiths, supra* 413 U.S. at 721-722, 93 S. Ct. at 2854-2855).

[4] The defendant's Memorandum in support of his Motion for Summary Judgment (Paper 36) discusses the interests served by the In-State Policy in terms of a rational basis standard, rather than a strict scrutiny standard.[14] The purposes purportedly served by the Policy have been set forth by the defendant as follows:

> (1) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
>
> (2) achieving equalization, between the affected classes, of the expenses of providing educational services;
>
> (3) efficiently administering the University's in-state determination and appeals process; and

[13] The defendant's argument that Justice Rehnquist and Chief Justice Burger have already indicated that *Nyquist* is not controlling in the present case is unpersuasive, as this statement was merely dicta in a dissenting opinion. Further, the court notes that both Justices filed dissents in *Nyquist.*

[14] The plaintiffs have noted that the defendant conceded in his brief to the Court of Appeals for the Fourth Circuit that the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard." (Br. at 32).

(4) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

Although these factors would arguably constitute a sufficient justification for the University's policy under a rational basis analysis, they fail to meet the high burden which the defendant faces under a strict scrutiny standard.

Citizens and immigrant aliens do not necessarily have a "closer affinity" to the State than do nonimmigrant aliens. This is particularly apparent in the context of this case, since it has already been determined that, as a matter of both federal and state law, G-4 nonimmigrant aliens are capable of acquiring domicile in the state of Maryland. In addition, the state affinity rationalization was specifically considered and rejected by the Supreme Court in *Nyquist v. Mauclet, supra.*

Similarly, cost equalization is an insufficient justification for the University's policy. As this court has previously noted:

> "Nonimmigrant aliens, even those such as plaintiffs' fathers whose salaries are exempt from state income tax, who have resided in Maryland for 10 or 15 years, as have plaintiffs' fathers, might well have contributed far more financial support to the University of Maryland through payment of real property, sales and other taxes than would have a student, financially independent for at least 12 months, who maintained a domicile in Maryland for 6 months prior to his class registration. Yet such a student, who conceivably could have contributed almost nothing to the Maryland tax base, is allowed to prove Maryland domicile under the 'In-State Policy.'"

Moreno v. University of Maryland, 420 F. Supp. at 560.[15]

[15] Cost equalization is the most persuasive rationale set forth by the defendant in support of the Policy. As summarized by the defendant, the contention is as follows:

> "The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational

The rationalization that the preclusion of nonimmigrants promotes the efficient administration of the University's policy is patently insufficient under a strict scrutiny analysis. *Cf. Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267, 94 S. Ct. 1076, 1086, 39 L. Ed. 2d 306 (1974). It is apparent that the University already has an administrative procedure through which eligibility for in-state status may be determined on a case-by-case basis when necessary. Thus any questions of in-state eligibility for nonimmigrants could easily be processed through the University's existing administrative procedures. The fact that this would result in an increased cost to the University is an insufficient justification for the Policy. *Sugarman v. Dougall, supra* 413 U.S. at 646, 93 S. Ct. at 2849.

Finally, the University's rationalization that the present policy prevents disparate treatment among categories of nonimmigrant aliens is not persuasive. If that portion of the University's policy which limits consideration for in-state eligibility to citizens and immigrant aliens were stricken, then nonimmigrant aliens would be uniformly eligible for consideration for in-state status under the terms of the policy applicable to citizens and aliens alike. The fact that certain categories of nonimmigrants would,

relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.*, nonimmigrants and other nonresidents." (Paper 36, p. 16-17).

As the defendant's argument implies, however, and as was previously conceded in the defendant's Brief to the Fourth Circuit Court of Appeals, although this argument would be sufficient under a rational basis analysis, it is insufficient under a strict scrutiny standard. Under a strict scrutiny test it is incumbent upon the State to show that its interest is constitutionally permissible and substantial and that the questioned classification is necessary to the fulfillment of that interest. *See, Examining Board v. Flores de Otero, supra.*

as a matter of law, prove to be ineligible for in-state treatment is an insufficient basis for precluding consideration of those who could otherwise qualify under the terms of the policy.

For the foregoing reasons, the Court finds that the University of Maryland's In-State Policy violates the Equal Protection Clause of the Fourteenth Amendment to the extent that it denies nonimmigrant aliens consideration for eligibility for in-state status.

II. *The Supremacy Clause Claims*

The plaintiffs contend that the University's In-State Policy violates the Supremacy Clause on two grounds. First, the plaintiffs claim that the Policy conflicts with international agreements entered into by the United States. Second, the plaintiffs argue that the Policy conflicts with the exclusive authority of Congress over immigration.

A. Interference With International Agreements

[5] The substance of the plaintiffs' contention on this ground is that the University's Policy conflicts with the international agreements entered into by the United States which establish the international organizations employing the plaintiffs' fathers in this country. Specifically, the plaintiffs contend that the Policy interferes with the provisions in the international agreements which preclude both Federal and State taxation of the salaries paid to non-American employees of the designated organizations. The purported conflict with these agreements stems from the fact that one of the University's express justifications for the Policy is to promote cost equalization for those individuals subject to the full spectrum of Maryland taxes. Thus, largely because the plaintiffs' fathers are not subject to the state income tax, they are not accorded the benefits derived from in-state classification.

The defendant maintains that there is no direct conflict between the University's Policy and the international agreements referred to by the plaintiff. The only arguable conflict which exists is between one of the rationales advanced in support of the University's Policy and the income tax exemptions granted by the international agreements. The defendant contends that this is insufficient evidence of an impermissible conflict under the Supremacy Clause.

[6] As stated by the Supreme Court in *DeCanas v. Bica*, 424 U.S. 351, 357 n.5, 96 S. Ct. 933, 937 n.5, 47 L. Ed. 2d 43 (1976), "the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." An indirect or hypothetical conflict is insufficient, however, to render invalid a state statute or policy, for the Supreme Court has stated that the reserved powers of the State "should be respected unless there is a *clear collision* with a national law which has the right of way under the Supremacy Clause of Article VI." *Kesler v. Dept. of Public Safety*, 369 U.S. 153, 172, 82 S. Ct. 807, 818, 7 L. Ed. 2d 641 (1962) (Emphasis added). *Cf., Seagram & Sons v. Hostetter*, 384 U.S. 35, 45, 86 S. Ct. 1254, 1260, 16 L. Ed. 2d 336 (1966); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813, 817, 4 L. Ed. 2d 852 (1960).

In this case it is apparent that there is no "clear conflict" between the policies in question. The University's Policy seeks to confer certain economic benefits on individuals closely affiliated with the State of Maryland. The mere fact that one of the factors which is considered in determining eligibility for this benefit is whether or not the applicant's income is taxed by Maryland does not necessarily imply that the policy conflicts with the tax policies contained in the relevant international agreements. The "conflict" between these policies, in and of itself, is too attenuated to warrant invalidating the University's Policy.

B. Interference With Congress' Exclusive Control Over Immigration.

[7] The plaintiffs contend that the University's Policy violates the Supremacy Clause in that it encroaches upon the exclusive federal power over immigration and naturalization. The defendant, however, maintains that the Policy falls within the range of discretion afforded to states in dealing with aliens within their borders.

Initially, as the Supreme Court noted in *DeCanas v. Bica*, 424 U.S. 351, 355, 96 S. Ct. 933, 936, 47 L. Ed. 2d 43 (1966):

> ". . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by [the] constitutional power [to regulate immigration], whether latent or exercised."

The Court went on to explain that a regulation of immigration "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*

Similarly, as the Court stated in *Examining Board v. Flores de Otero, supra* 426 U.S. at 604-605, 96 S. Ct. at 2282:

> "We do not suggest, however, that a State, Territory, or local government, or certainly the Federal government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens. *In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.*" (Emphasis supplied).

As this section of the Court's opinion indicates, the standard utilized to uphold a state regulation dealing with benefits to be accorded to aliens is essentially the strict scrutiny analysis previously discussed in reference to the Equal Protection arguments. Thus, for the reasons previously set forth, the defendant has failed to meet the high burden required in order to justify the discriminatory treatment of nonimmigrant aliens under the University's Policy. This court, therefore, finds the Policy to be unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution.[16]

III. *Conclusion*

Accordingly it is ORDERED this 17th day of April, 1980 by the United States District Court for the District of Maryland, that the plaintiffs' Motion for Summary Judgment is hereby GRANTED and the defendant's Motion for Summary Judgment is hereby DENIED.

[16] The court specifically notes that this decision does not require that domicile, as defined under state law, be the test for determining eligibility for in-state status at the University of Maryland. The only matter which the Court has decided is that the standards which the University utilizes in determining in-state eligibility must either be uniformly applied to all citizens and resident aliens, or else any discriminate treatment of aliens must withstand strict scrutiny analysis, as set forth in this opinion, in order to be upheld.

In The United States District Court
For The District of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

Plaintiffs,

v.

John S. Toll, President
University of Maryland,

Defendant.

ORDER

(Filed May 30, 1980)

For the reasons stated in the Court's Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116 (D. Md. 1979), and in the court's Memorandum Opinion filed on April 17, 1980, it is this 30th day of May, 1980, hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That the University of Maryland's "In-State Policy", as enforced prior to June 23, 1978, which denied G-4 aliens the opportunity to establish "In-State" status through the use of an irrebuttable presumption of non-domicile, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That the University of Maryland's "In-State Policy", as enforced on, before, and after June 23, 1978, which denies G-4 aliens the opportunity to establish "In-State" status, is unconstitutional as it is in violation of the Equal Protection Clause of The Fourteenth Amendment and the Supremacy Clause;

3. That the court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy" prior to June 23, 1978;

4. The court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy", as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the Memorandum Opinion of April 17, 1980, and Paragraph 2 of this Order.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy" as it was in effect prior to June 23, 1978, or as it has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to "In-State" status for purposes of tuition and charge differential determinations;

6. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's order of July 13, 1976, had been immediately effective, including interest at the legal rate.

7. For purposes of paragraph numbered 6 of this Order, the determination of which members of the subclass would have been granted reclassification to "In-State" status but for the stay pending appeal shall be based on the following determination of domicile: Whether, for each term in which such student was enrolled at the University during

the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles, as reflected in paragraph 3 of the Application Section of the "In-State Policy", for six consecutive months prior to the beginning of that semester;

8. In making the determination of domicile required by Paragraph 7 of this Order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland solely on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party;

9. The court reserves the question of court costs and attorneys' fees.

JAMES R. MILLER, JR.,
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg
and
Renee Otero, Jr.

Plaintiffs.

v.

University of Maryland
John S. Toll, President, University of Maryland

JUDGMENT

(Filed May 30, 1980)

In accordance with the Opinion dated July 13, 1976 and the Memorandum and Order dated April 17, 1980 and Order dated May 30, 1980 and filed in the above entitled case, it is

ORDERED and ADJUDGED: THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF PLAINTIFFS AGAINST DEFENDANTS.

Dated at Baltimore, Maryland this 30th day of May, 1980.

PAUL R. SCHLITZ,
Clerk.

By: RON LAWSON
DEPUTY CLERK.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

Plaintiffs

v.

John S. Toll, President,
University of Maryland

Defendant

ORDER

(Filed May 30, 1980)

The Court having read and considered the Motion To Stay Order Pending Appeal, filed on May 30, 1980, on behalf of John S. Toll, President, University of Maryland, the defendant above named;

And the Court having heard argument of counsel for the respective parties in chambers on May 30, 1980, at which time it was represented by counsel for the defendant Toll that were a stay granted the University of Maryland, for the fall 1980 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1980 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay, would refund the difference in tuition and other charges between the "out-of-state"

charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's order of May 30, 1980, were finally affirmed on appeal;

And the Court having determined from the foregoing pleading, arguments, and representation that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

IT IS, this 2nd day of June, 1980, by the United States District Court for the District of Maryland, hereby

ORDERED that the Motion To Stay Order Pending Appeal be granted as prayed and that the effectiveness of the Court's order filed May 30, 1980, be, and the same hereby is, STAYED.

JAMES R. MILLER, JR.
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg
and
Renee Otero, Jr.

v.

University of Maryland
John S. Toll, President, University of Maryland

AMENDED JUDGMENT

(Filed June 24, 1980)

In accordance with the Opinion dated July 13, 1976 and Memorandum and Order dated April 17, 1980 and Order dated May 30, 1980 and filed in the above entitled case, it is

ORDERED AND ADJUDGED:

(1) THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF DEFENDANT, UNIVERSITY OF MARYLAND, AGAINST PLAINTIFFS.

(2) THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF THE PLAINTIFFS AGAINST DEFENDANT, JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND.

Dated at Baltimore, Maryland, this 24th day of JUNE, 1980.

PAUL R. SCHLITZ,
Clerk.

JAMES R. MILLER, JR., JUDGE,
United States District Court.

OPINION
(Filed July 13, 1976)

United States District Court,
D. Maryland.

Civ. A. No. M-75-691

Juan Carlos Moreno et al.,
Plaintiffs,

v.

University of Maryland and
Dr. Wilson H. Elkins, President,
University of Maryland,
Defendants.

(420 F. Supp. 541)

JAMES R. MILLER, Jr., District Judge.

Opinion and Order

This is a purported class action suit in which the named plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, seek declaratory and injunctive relief against the defendants, the University of Maryland and Dr. Wilson H. Elkins, its president. Both sides have filed motions for summary judgment. The named plaintiffs are currently students at the University of Maryland, College Park campus, who reside in the State of Maryland with their parents, upon whom they are financially dependent. Plaintiffs' fathers all hold nonimmigrant alien visas issued pursuant to 8 U.S.C.A. § 1101(a)(15)(G)(iv)[1] [G-4 visas].

[1] Title 8, U.S.C., § 1101(a)(15)(G)(iv) defines as one class of non-immigrant alien those aliens who are "officers, or employees of such international organizations [those entitled

As employees of certain international organizations created under international agreements to which the United States is a party, the plaintiffs' fathers are exempted from state and federal taxes on salaries paid by these organizations.[2]

Under policies adopted by the Board of Regents of the University of Maryland effective for any term of the University beginning on or after January 1, 1974, (hereinafter referred to as the "In-State Policy"), students are divided into two classes, i.e., "in-state" or resident on the one hand and "out-of-state" or non-resident on the other, for purposes of determining admission, tuition rates, and charge differentials. Under this policy "out-of-state" undergraduate students are required to pay $1,260 more per year for tuition than "resident" students, as well as $100 more per year for a room. "Out-of-state" graduate students are charged $30 more per credit hour than "in-state" students.

The relevant sections of the "In-State-Policy" are as follows:

> *"General Policy*
>
> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to *immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States,* in the following cases:

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to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)], and the members of their immediate families."

[2] *See* Art. VII, § 9(b) of the Articles of Agreement of the International Bank for Reconstruction and Development (12/27/45), 60 Stat. 1440, T.I.A.S. No. 1502, as amended Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 and Art. XI § 9(b) of the Agreement Establishing the Inter-American Development Bank, (4/8/59), 10 U.S.T. 3029, T.I.A.S. No. 4397. Plaintiff Clare Hogg's father is employed by the former organization usually referred to as the World Bank; the fathers of the other two named plaintiffs are employed by the latter organization.

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester. (Emphasis added).

* * * * * *

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.

* * * * * *

"Definitions

"1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

* * * * * *

"4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time. . . ."

There are eight criteria which under the "In-State-Policy" "the University shall take into consideration, but shall not be limited to . . ." in determining whether Maryland domicile has been established. These criteria, applied to the individual upon whom the determination of domicile depends, are whether the individual:

a. Owns or rents and occupies real property in Maryland as his (her) domicile on a year-round basis.

b. Maintains a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintains within the State of Maryland all or substantially all personal possessions.

d. *Pays Maryland income tax on all earned income* including taxable income earned outside the State.

e. Registers all owned motor vehicles in Maryland.

f. Possesses a valid Maryland driver's license, if licensed.

g. Registers to vote in Maryland, if registered.

h. Gives a Maryland home address on federal and state income tax forms.

(Attachment to Defendant's Answer to Plaintiffs' Request for Admissions of Fact, with emphasis added.).

The University determined that the three named plaintiffs were not entitled to "instate" status. The determination was predicated upon a conclusion that the parent on whom each was financially dependent could not be domiciled in Maryland because each was in the country on a G-4 visa. Without success, all three plaintiffs availed themselves of the three-step appellate process provided by the University to students dissatisfied with their residence classification.[3]

[3] The "In-State Policy" provides that:

"A student who disagrees with his classification may request a personal interview with a classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee

The pertinent facts with respect to each of the individual plaintiffs are alleged as follows:

> "Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland."
>
> (Paper No. 1, Verified Complaint, ¶ 16).
>
> "Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland."

(IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final."

(*Id.*, ¶18).

"Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶21).

"Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, seconday schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 23).

"Plaintiff [Clare B.] Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Babara Hogg have filed joint United States income tax returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mr. Hogg's salary from the

International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 26).

"Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary school, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in [the above paragraph]; she has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 28).

Plaintiffs claim the actions of defendants in denying them "in-state" status are in violation of the Due Process, Equal Protection and Supremacy Clauses of the Constitution. They seek to enjoin the defendants from failing to reclassify them as students having "in-state" status and to enjoin the defendants from denying to any student "in-state" status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent either holds a G-4 visa or pays no Maryland State income tax pursuant to an international agreement to

which the United States is a party on wages paid by an international organization.

Defendants have moved for summary judgment on various jurisdictional and procedural grounds, as well as on the merits of the case.

I. Jurisdiction

Defendants' initial argument is that this court lacks subject matter jurisdiction under 28 U.S.C. § 1343(3) or (4)[4] because plaintiffs' claim is founded upon the Maryland law of domicile and presents no federal question:

> "Plaintiffs' cause of action and the core of their grievance does not present a deprivation by the Defendants of a federal statutory or constitutional right, privilege or immunity, but rather, rests upon an interpretation of the Maryland definition of domicile." (Memorandum in Support of Defendants' Motion For Summary Judgment, at p. 10).

[1] Plaintiffs filed this suit pursuant to, *inter alia,* 42 U.S.C. § 1983 which authorizes a "suit in equity" against a "person" to redress "the deprivation" under color of any State regulation "of any rights, privileges, or immunities secured by the Constitution" to any "person within the jurisdiction" of the United States. This section creates a federal cause of action but it does not by itself confer jurisdiction on federal district courts to adjudicate claims brought pursuant to it. The jurisdictional counterpart of 42 U.S.C. § 1983 is 28

[4] Title 28, U.S.C., § 1343 provides that the district courts have jurisdiction of any civil action authorized by law to be commenced by any person:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

U.S.C. § 1343. *Hagans v. Lavine,* 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). Jurisdiction under § 1343(3) exists at least for deprivations by state officials of rights "secured by the Constitution of the United States."[5] Jurisdiction exists in this court under § 1343 (3) if a constitutional claim of sufficient substance has been raised by the § 1983 cause of action. *Hagans v. Lavine, supra.*

[2] Plaintiffs' § 1983 claim is premised on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Contrary to defendants' assertions, it is not the Maryland law of domicile which gives rise to this suit, but rather the "In-State Policy" of the University of Maryland which has been interpreted by the defendants as automatically classifying holders of G-4 visas as non-residents for purposes of tuition, on the assumption that no one in the United States on a G-4 visa can ever have the requisite intent to establish a Maryland domicile. The due process claim, premised on an argument that the University of Maryland's policy establishes an irrebutable presumption with respect to residence and domicile for tuition purposes similar to that struck down in *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), and the equal protection claim, based on an alleged violation of both the strict scrutiny and the reasonable basis-rational relationship tests, are at the heart of this case. These are matters of federal law. Moreover, these claims are not so insubstantial as to warrant dismissal for lack of subject matter jurisdiction. Such dismissal could be granted only as to claims "absolutely devoid of merit," *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 24 S. Ct. 553, 48 L. Ed. 795 (1904); "wholly insubstantial,"

[5] Whether the jurisdictional scope of § 1343(3) is fully coextensive with the substantive provisions of § 1983, so that § 1343(3) would provide jurisdiction for any suit premised on the deprivation under color of state law of a right secured by any Act of Congress is a question not yet decided by the Supreme Court, *Hagans v. Lavine, supra,* at 534 note 5, 94 S. Ct. 1372, but the Fourth Circuit has so held. *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974).

Bailey v. Patterson, 369 U.S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); "obviously frivolous,"*Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482 (1910); or "no longer open to discussion," *McGilvra v. Ross*, 215 U.S. 70, 80, 30 S. Ct. 27, 54 L. Ed. 95 (1909). *See also Hagans v. Lavine, supra, Baker v. Carr*, 369 U.S. 186, 198-204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

The claims in this case are clearly not insubstantial. *See Vlandis v. Kline, supra; Hooban v. Boling*, 503 F.2d 648 (6th Cir. 1974); *Klem v. Carlson*, 473 F.2d 1267 (6th Cir. 1973); *Jagnandan v. Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974); *Sturgis v. State of Washington*, 368 F. Supp. 38 (W.D. Wash.), *aff'd mem.* 414 U.S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971).

II. Are the Defendants "Persons" within 42 U.S.C. § 1983?

[3] Defendants argue that this suit cannot be maintained against either the University of Maryland or Dr. Elkins, its President, since neither are "persons" within the meaning of 42 U.S.C. § 1983.

In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Supreme Court held that municipalities were not "persons" within the meaning of 42 U.S.C. § 1983, at least in damage suits. *Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973), makes clear that that ruling also applies where the only relief sought is injunctive or declaratory. *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973), established that counties were not § 1983 persons. In *Huntley v. North Carolina State Board of Education*, 493 F.2d 1016, 1017 n.2 (4th Cir. 1974), the Fourth Circuit decided that municipal agencies are not "persons" for § 1983 purposes. A state is also not a proper defendant in a § 1983 action. *Meyer v. State of New Jersey*, 460 F.2d 1252 (3rd Cir. 1972; *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Hinish v. State of*

Maryland, 393 F. Supp 53 (D. Md. 1975). This doctrine applies equally to state agencies. *Bennett v. People of State of California*, 406 F.2d 36 (9th Cir.), *cert. den.*, 394 U.S. 966, 89 S. Ct. 1320, 22 L. Ed. 2d 568; *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir.), *cert. den.*, 419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 107 (1974); *Edwards v. Philadephia Electric Co.*, 371 F. Supp. 1313 (D.C. Pa. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975).

If the University of Maryland is a state agency, it is not a "person" within § 1983 and no cause of action can be brought against it under that section. Courts considering whether a particular college or university is or is not a state agency have considered the laws of the state as they define the relationship between the state and the school; whether the school is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of the school's autonomy over its operations; the ownership of the school's property; whether its property is immune from state taxation; whether the sovereign has immunized itself from responsibility for the school's operations; whether a judgment for damages against the school would be payable out of the state treasury; and the source of the school's financing. It has also been stated that generally the same inquiry is made and criteria considered in determining whether a state university is a § 1983 "person" as is made in deciding whether a damage suit against the state university would be barred by the Eleventh Amendment. *See Gordenstein v. University of Delaware*, 381 F. Supp. 718 (D. Del. 1974); *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *app. dismissed* 506 F.2d 355 (3d Cir. 1974); *Langsner v. Morgan State College*, Civil No. HM-74-1359 (D. Md. Jan. 9, 1976).

In *Langsner* Judge Herbert F. Murray held that Morgan State University was a state agency and not a "person" within the meaning of § 1983. In the present case an uncontradicted affidavit[6] of Dr. Wilson H.

[6] Under Rule 56, F.R.Civ.P., the uncontradicted facts in this affidavit may be taken as true.

Elkins, President of the University of Maryland, has been filed which establishes that virtually all of the factors considered determinative in *Langsner* apply also to the University of Maryland. These factors set forth in the margin[7] fall within the scope of the factors discussed in *Gordenstein, supra,* and *Samuel, supra,* as well. We are persuaded that the University of Mary-

[7] Dr. Wilson's affidavit states:

"(a) All real property of the University belongs to the State of Maryland, and substantially all such property is titled in the name of the State of Maryland to the Use and Benefit of the University of Maryland or to the Use and Benefit of the Board of Regents of the University of Maryland;

"(b) The sale and/or lease of real property of the University is reviewed by the Department of General Services, State of Maryland, and approved by the Board of Public Works (including the Governor of the State of Maryland), State of Maryland. The acquisition and/or lease of real property by the University of Maryland is similarly reviewed and approved;

"(c) All, or substantially all, of the contracts and leases to which the University of Maryland is a party are first reviewed by the Office of the Attorney General, State of Maryland;

"(d) Payroll checks of employees of the University are drawn on the treasury of the State of Maryland and bear the facsimile signatures of the Treasurer and Comptroller of the State of Maryland;

"(e) The annual Budget of the University is presented to and must be approved by the General Assembly of the State of Maryland, and is subject to review and amendment by the State Department of Budget and Fiscal Planning;

"(f) All University funds are funds of the State of Maryland. All funds available to the University are obtained substantially through appropriations of the Maryland General Assembly, including student fees, and government and private grants, which are specifically appropriated by the General Assembly for use by the University. All, or substantially all, bills paid by the University are paid through checks drawn on the Treasury of the State of Maryland;

"(g) The purchase of goods and equipment by the University is exempt from Maryland Sales Tax. The

land, like Morgan State College, is not a § 1983 "person" and cannot be sued under that section.

With respect to the other defendant, Dr. Elkins, however, it is equally clear that when he is sued in his official capacity under 42 U.S.C. § 1983 in a suit seeking injunctive and declaratory relief only, he is a "person"

University is entitled to avail itself of the purchasing facilities of the Maryland Department of Budget and Procurement;

"(h) The University's financial records are audited by the Maryland General Assembly, Division of Legislative Auditors. The University must also provide to the Board of Public Works or any member of the General Assembly any requested information about any phase of its operation, and must make an annual report thereon to the latter;

"(i) Decisions by the University with respect to employment grievances, including terminations, of classified employees, are appealable for determination by the Secretary of Personnel, State of Maryland;

"(j) Such comprehensive liability insurance as the University is permitted to carry is authorized and limited under Article 77A, § 15A of the Annotated Code of Maryland. Insurance to University property is provided through participation in State of Maryland Insurance Plans;

"(k) The Board of Regents of the University consists of fifteen members. The Governor of the State of Maryland appoints fourteen with the advice and consent of the State Senate. The remaining members are the Maryland Secretary of Agriculture;

"(l) The Governor, the State Treasurer, and the State Comptroller are notified of all meetings of the Board of Regents of the University and have the authority to sit with the Board. The State budget director, and the chairmen of the State Senate Finance committee and the State House Ways and Means committee are invited to sit with the Board when requests for appropriations are prepared.

"(m) The University obtains its legal representation from the Attorney General of the State of Maryland"

In addition to the above, as noted by Judge Murray in *Langsner*, Art. 78A § 16C of the *Annotated Code of Maryland* would appear to indicate that any money judgment, against the University of Maryland "will be paid, if at all, by the State of Maryland." *Langsner*, p. 9.

for purposes of that section and amenable to suit thereunder. *Burt v. Board of Trustees of Edgefield Co. School Dist.*, 521 F.2d 1201 (4th Cir. 1975); *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Rochester v. White*, 503 F.2d 263 (3d Cir. 1974); *Langsner v. Morgan State College, supra.*

III. Case or Controversy

[4] Defendants argue that this court lacks jurisdiction because no Art. III § 2[8] case or controversy exists between the plaintiffs and the defendants because the plaintiffs, dependent as they are on their parents, presumably do not pay their own tuition and thus stand to lose or gain nothing by the outcome of this lawsuit. Aside from the lack of evidence in the record to support the underlying assumption on the part of the defendants it is clear that the plaintiffs in this case are presenting a constitutional question "in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110, 89 S. Ct. 956, 960, 22 L. Ed. 2d 113 (1969). It is the plaintiffs themselves who attend the University of Maryland and who are allegedly being unconstitutionally overcharged by that institution.

The plaintiffs in this case have a personal stake in the outcome and have an interest adverse to the defendants since the tuition rates charged them as nonresidents must be paid in order for them to attend the University of Maryland. Plaintiffs' complaint alleges that they themselves are being subjected to higher tuition and other costs. Moreover, under Maryland law, *Annotated Code of Maryland*, Art. 1 § 24, plaintiffs who are all over 18, are adults. The law places no responsibility on their parents to pay their tuition. If these rates cannot be paid, either by the plaintiffs themselves, by their parents, or by both parents and students, the

[8] Art. III § 2 of the Constitution of the United States limits the judicial power of federal courts to "Cases" or "Controversies."

resulting loss of educational opportunity falls squarely on the plaintiffs. They have a sufficient interest to make the lawsuit an Article III case or controversy under the tests laid down by the Supreme Court. *O'Shea v. Littleton,* 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974); *Goosby v. Osser,* 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); *see also Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974).

IV. Standing

[5] Defendants also allege that plaintiffs lack standing to sue because they are financially dependent on their parents who, therefore, presumably pay all of plaintiffs' tuition costs. While the Supreme Court has noted that the concept of justiciability, which expresses the "case or controversy" requirement of Article III, is not synonymous with that of standing, *Schlesinger v. Reservists, etc., To Stop The War,* 418 U.S. 208, 215, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), they do overlap. *See Warth v. Seldin, supra,* 422 U.S. at 498-499, 95 S. Ct. at 2204, where it is stated:

> "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr,* 369 U.S. 186, 204 [82 S. Ct. 691, 7 L. Ed. 2d 663] (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or

actual injury resulting from the putatively illegal action. . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 [93 S. Ct. 1146, 35 L. Ed. 2d 536] (1973). *See Association of Data Processing Service, Inc. v. Camp*, 397 U.S. 150, 151-154 [90 S. Ct. 827, 25 L. Ed. 2d 184] (1970)." (Footnotes omitted).

The plaintiffs in this case, as discussed above, are asserting their own legal rights and interests and have a sufficient stake in the outcome of this lawsuit to establish standing to bring it. *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Association of Data Processing Organizations Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

V. The Eleventh Amendment

Defendants argue that the Eleventh Amendment to the Constitution bars this suit.[9]

[6, 7] Since the defendant University of Maryland cannot be sued under 42 U.S.C. § 1983, the Eleventh Amendment defense need be considered only with respect to Dr. Elkins. The short answer to this contention is that the Eleventh Amendment does not bar suits seeking only prospective injunctive relief against state officials who, acting in their official capacity under color of state law or regulation, deprive plaintiffs of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Any ancillary effect which a prospective injunction against Dr. Elkins, if issued in this case, would have on the treasury of the State of Maryland is a "permissible and often an inevitable consequence of the principle announced in *Ex Parte Young, supra*." *Edelman v. Jordan, supra*, 415 U.S. at 668, 94 S. Ct. at 1358.

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[9] The Eleventh Amendment provides:

"The Judicial power of the United States shall be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

VI. Absention

[8] Defendants urge the court to abstain from deciding this case in order that the Maryland courts can decide if a G-4 alien can be domiciled in Maryland.

Abstention is a judicially created doctrine. It has several branches to its family tree. Two of these branches are urged as applicable here to warrant this federal court to stay its hand.

The first is the abstention rationale enunciated in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), holding that a federal court should abstain in order to avoid unnecessary conflict with the regulation by a state of a complicated area of local interest.

The *Burford* case arose out of disputes concerning the application of a regulation of the Texas Railroad Commission establishing minimum spacing between oil wells. In *Burford* the Court stressed that abstention was appropriate because the Texas scheme of regulating oil and gas drilling was an extremely thorny problem involving certain "non-legal complexities." (*Id.* at 323, 63 S. Ct. 1098). The Texas legislature had established a Commission to resolve these technically complicated geologic factual disputes, "as a part of the entire conservation program with implications to the whole economy of the state." (*Id.* at 325, 63 S. Ct. at 1103). Moreover the Texas legislature had also established a system of thorough judicial review by its own state courts which could provide as full relief as could the federal courts. By concentrating all direct review of the Commission's orders in the state district court of one county, the Texas legislature also sought to avoid the confusion of multiple review of the same general issues. Prior interference by federal courts in this regulatory scheme, the *Burford* Court noted, had previously caused such confusion and had created numerous problems for the Texas Governor, the Texas legislature and the Railroad Commission.

The considerations which persuaded the *Burford* Court to order federal abstention are absent from this case. The process by which the University of Maryland determines a student's domicile does not involve a complicated area which the Maryland legislature has singled out for special treatment. The legislature has not seen the need to create a state agency staffed with experts in order to effect a consistent and harmonizing treatment of a particularly thorny matter of local interest. There is no special system of judicial review. There is no history of prior interference by the federal courts in the University of Maryland's procedures, causing confusion and inconsistency. It is not predictable that the normal functioning of the system by which the state determines a student's domicile would give rise to a surfeit of lawsuits seeking to interpose federal courts in matters of purely state interest. Even this suit, although the named plaintiffs do seek this court to declare them Maryland domiciliaries, has as its primary thrust to force the classification process to operate meaningfully with respect to G-4 alien students. The plaintiffs here are not seeking to "short circuit" the University of Maryland's classification scheme, but rather have submitted themselves to it. A decision by this court on the merits of plaintiff's complaints will not conflict with a state regulatory scheme in the manner feared by the Court in *Burford*. Since none of the factors determinative in *Burford* exists here, abstention on the rationale of that case is not warranted.

The second branch of the abstention family tree invoked by the defendants is the so-called *Pullman* doctrine. The decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), and its progeny have established that abstention is proper where an interpretation or construction of an unclear state statutory or constitutional provision might end the litigation, thereby eliminating the need for a federal court to resolve federal constitutional issues. *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973); *Lake Carriers' Association v.*

MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1974). The primary reasons for invoking abstention in the *Pullman* context are to avoid unnecessary friction in federal-state relations and to avoid premature federal constitutional adjudication. *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965).

The language of the "In-State Policy" of the University of Maryland which is under attack here is not subject to an interpretation in a Maryland court which would avoid plaintiffs' federal constitutional challenge. That regulation on its face establishes that only "U.S. citizens" and "immigrant aliens" can establish in-state status, and then only under certain conditions which are discussed *infra*. By virtue of the words of the "In-State Policy," the University of Maryland, as a result of the fact that the plaintiffs' fathers, whose domiciles are determinative of their respective dependent's residency status, are all non-immigrant G-4 aliens, will automatically attribute to them out-of-state status for admission, tuition and charge differential purposes. No interpretation of the wording of the "In-State Policy" has been offered which changes that stated result. Since the regulation is clear and is not subject to any interpretation which could avoid a federal constitutional issue, the reasons for invoking the *Pullman* abstention doctrine are absent. *Wisconsin v. Constantineau*, 400 U.S. 433, 437-439, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); *Zwickler v. Koota*, 389 U.S. 241, 250, 251, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

Nevertheless, defendants argue that abstention is appropriate because the Maryland courts have never decided whether or not a G-4 alien could establish a Maryland domicile. This novel abstention argument would require federal courts to abstain whenever an unresolved question of state common law is involved in federal constitutional litigation. Defendants have presented no authority, and the court has found none, which supports the application of the abstention

doctrine in these circumstances. The Maryland common law of domicile is clear and provides sufficient background to resolve the domicile question raised by the plaintiffs in the context of their federal constitutional challenge to the University of Maryland's policies. *See Mariniello v. Shell Oil Company,* 511 F.2d 853, 860-861 (3rd Cir. 1973).

Federal district courts are presumed to be knowledgeable in the law of the states in which they sit, *see Runyon v. McCray,* ___ U.S. ___, ___, ___, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), and are often called upon to resolve state law domicile questions in diversity of citizenship cases.[10] While this is not a diversity case and there is a constitutional question to be resolved, on balance, it would be unwise to extend the abstention doctrine to a case such as this. No principles of federalism would be advanced since no unclear state statute or constitutional provision subject to state court construction or interpretation is involved. The delay and expense attendant if the court abstained would be great. Abstention has been confined to certain narrowly limited special circumstances, *Kusper v. Pontikes, supra; Lake Carrier's Association v. MacMullan, supra; Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), which do not exist here. Therefore, the court declines to abstain in this case. *See also Examining Board of Engineers, Architects and Surveyors v. DeOtero,* 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976).

VII. The Merits

A. Due Process

Plaintiffs raise a due process claim, relying principally on *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230,

[10] Abstention has never been deemed appropriate in diversity cases merely where there are unsettled questions of state law involved. *McNeese v. Board of Education,* 373 U.S. 668, 673, n. 5, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); *Meredith v. Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943); *Martin v. State Farm Insurance Co.,* 375 F.2d 720, 722 (4th Cir. 1967).

37 L. Ed. 2d 63 (1973); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), *and Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). While plaintiffs do not challenge the University of Maryland's policy of charging non-domiciliaries higher tuition rates, they do allege that the University of Maryland's "In-State Policy" creates an irrebuttable presumtpion, that non-immigrant aliens holding G-4 visas cannot establish a Maryland domicile, a fact that is not, they argue, universally true.

In *Vlandis*, the Supreme Court declared unconstitutional a Connecticut statute which classified certain married and unmarried students accepted for admission to the University of Connecticut as out-of-state students for tuition purposes based on the applicant's legal address prior to or at the time of his application. Under the statute, if a student were classified "out-of-state" under this system at the time of application for admission, the student could not change his status no matter what the student's actual domiciliary intent was at a later date. The student's status established at the time of his application for admission was deemed to continue during his period of attendance at the university.

In reaching its decision the Court noted:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category." (412 U.S. at 448, 93 S. Ct. at 2234).

Under these circumstances, the Court rejected the state's attempts at justification and held that:

> ". . . since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the

> resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona-fide resident entitled to in-state rates." (412 U.S. at 452, 93 S. Ct. at 2236).

In *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the Court held unconstitutional on due process grounds Illinois' statutory irrebuttable presumption that all unmarried fathers are unqualified to raise their children. The Court said that a state could not conclusively presume that every unmarried father was unfit to raise his children, but must under the due process clause provide an opportunity for a hearing on the issue of a particular unmarried father's fitness where his fitness was challenged.

Similarly, in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), the Court invalidated mandatory leave and return rules for pregnant teachers in Ohio and Virginia on due process grounds, because the rules established conclusive presumptions of facts which were not universally true, namely that all women, who were 4 or 5 months pregnant or who gave birth 3 months or less before they sought to return to work, were physically incapable of performing their duties. The Court held that such determinations had to be made on an individual basis. The maternity leave rules were found to have no rational relationship to the interests of those states in preserving continuity of instruction and in protecting the health of the mother or expectant mother.

In this case, then, several questions relative to plaintiffs' due process claim must be resolved: (1) does the University of Maryland's "In-State Policy" create an irrebuttable presumption concerning the domicile of

G-4 alien? (2) if so, is that presumption appropriate because universally true? (3) if not, can the defendants so justify that presumption as to save it from unconstitutionality?

The defendants argue that the "In-State Policy" does not rest upon or create an irrebuttable presumption as to the domicile of a G-4 alien, but merely establishes the status of an individual as a G-4 alien as one of the factors to be considered in determining domicile for tuition purposes, albeit the "paramount" factor. Defendants also argue that there is no irrebuttable presumption, because plaintiffs may, as may any other student, obtain review of their domiciliary classification at any time. However, these arguments fall short of the mark. As admitted at oral argument, and as evidenced by the express language of the "In-State Policy," the University of Maryland determines on a case-by-case basis for tuition and fees purposes the domicile of only *"United States citizens* and . . . *immigrant aliens lawfully admitted for permanent residence* in accordance with the laws of the United States." Under the University's policies, a financially independent student in the United States on the basis of a G-4 visa, or a student who is financially dependent on a parent who holds a G-4 visa, as are the named plaintiffs in this case, is automatically "attributed out-of-state status for admission, tuition, and charge differential purposes. . . ."[11] So long as the G-4 visa status of the student or his parent continues, any other evidence of domicile brought before the University could not possibly produce a reclassification of the student in question. The single controlling factor in the case of a G-4 alien is that visa classification. All other facts relating to domicile are irrelevant. The fact that the State will listen to evidence totally immaterial to its predetermined conclusion concerning the domicile of a G-4 alien

[11] The University bases the tuition rates of a financially dependent student on the domicile of his parents. A parent with a G-4 visa could not, under the In-State Policy, establish a Maryland domicile.

does not make that conclusion any less irrebuttable. *See United States Department of Agriculture v. Murry*, 413 U.S. 508, 512, 93 S. Ct. 2382, 37 L. Ed. 2d 767 (1973); *Stanley v. Illinois, supra.*

However, even if a certain presumption of fact is irrebuttable, the resulting classification system is not *a fortiori* unconstitutional. If the presumed fact is necessarily true, it would be different from the presumptions about students in *Vlandis*, mothers in *LaFleur*, fathers in *Stanley*, household members in *Murry*, and drivers in *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), among others, which the Court has previously invalidated.

The defendants have argued that domicile is the basis on which tuition rates are determined and that all nonresident aliens, including those in the United States on G-4 visas, are precluded by the terms and conditions of their visas from being domiciled in Maryland. If, as the defendants argue, under the law of domicile of Maryland, a G-4 alien cannot establish domicile, then a classification based on domicile which presumes nondomicile for such aliens is not contrary to fact and is universally true. Inquiry therefore must be made into the common law of Maryland relating to domicile and into federal law defining the nature of a G-4 alien's stay in the United States.

B. Maryland Law of Domicile

In *Shenton v. Abbott*, 178 Md. 526, 15 A.2d 906 (1940), the Court of Appeals of Maryland held that:

> "A person's domicile is the place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning." (*Id.*, at 530, 15 A.2d at 908).

Shenton v. Abbott also establishes that a person retains his original domicile if he does not acquire a new one. Two elements must be shown to prove a change of domicile: (1) actual removal to or physical presence in another habitation and (2) an intent to remain there permanently or at least for an unlimited time. *Id.* at 530, 15 A.2d 906. If a person has established a new domicile, a "floating intent to return to his former domicile at some future time" does not negative the intent to establish the new domicile. *Id.* at 533, 15 A.2d at 909.

It is indisputable in this case that plaintiffs' fathers, because they are G-4 aliens, did not have Maryland as their respective original domiciles but each could only have acquired a Maryland domicile if he had changed his original domicile. The court in *Shenton* also stated:

> "No temporary residence, whether for the purposes of business, health, or pleasure, occasions a change of domicil. Even though a person may be absent from his domicil for many years, and may return only at long intervals, nevertheless he retains his domicil if he does not acquire a domicil elsewhere." (*Id.*, at 530, 15 A.2d at 908).

As a general proposition of law, *Shenton* noted that "[T]he determination of the place of domicil depends upon the circumstances of each case." (*Id.*, at 533, 15 A.2d at 909). All of these principles are still controlling Maryland law. *Bainum v. Kalen,* 272 Md. 490, 325 A.2d 392 (1974); *Knapp v. Comptroller,* 269 Md. 697, 309 A.2d 635 (1973); *Liberty Mutual Insurance Co. v. Craddock,* 26 Md. App. 296, 338 A.2d 363 (1975).

In addition to physical presence and intent to remain permanently or indefinitely, the Maryland courts implicitly recognize, as another factor necessary to the establishment of a new domicile, that the person seeking to change his domicile must have the legal capacity to do so. *Liberty Mutual Insurance Co. v. Craddock, supra,* at 303, 338 A.2d 363. *See Restatement (Second) of Conflicts,* § 15 (1971). Thus, in the case of a

minor child, ordinarily legally incapable of a domicile separate from that of its parent, the domicile of a minor child in Maryland is with its parents. If the child's parents are divorced, the child's domicile is that of the parent to whom legal custody has been awarded. *Taylor v. Taylor,* 246 Md. 616, 619, 229 A.2d 131 (1966); *Berlin v. Berlin,* 239 Md. 52, 55, 210 A.2d 380 (1964); *Rethorst v. Rethorst,* 214 Md. 1, 133 A.2d 101 (1957). However, a minor child retains the domicile of its father if the child lives with neither parent. *Rethorst v. Rethorst, supra,* at 12, 133 A.2d 101. If there has been no legal fixing of custody, then the minor child's domicile is that of the parent with whom it lives. *Id.*; *Ross v. Pick,* 199 Md. 341, 349, 86 A.2d 463 (1952). A minor child who falls within these common law principles can never establish an independent domicile, whatever may be that child's intent to do so. Because a minor child is not *sui juris* and can therefore not have legal effect given to its actual intent, physical presence in a certain state, and an intent to remain there indefinitely, do not fix or change the domicile of a minor. During minority, the common law fixes the child's domicile. *Sudler v. Sudler,* 121 Md. 46, 88 A. 26 (1913).

There is nothing in Maryland law, possibly aside from the principle that a person intending a change in domicile must be legally capable of doing so, to prevent a G-4 visa holder from obtaining a Maryland domicile. Therefore, federal law must be examined to determine whether such law relating to G-4 aliens in any respect renders such aliens legally incapable of changing the domicil.

C. Federal Law

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.,* defines 12 classes of nonimmigrant aliens which, including subclasses, describe 17 types of nonimmigrants. Class G aliens are aliens who are in the United States as resident representatives of foreign governments and members of their immediate families and staffs, as well as aliens who are foreign

representatives to or employees of international organizations covered by the International Organizations Immunities Act, 22 U.S.C. § 288, and members of their immediate families and personal staffs. Specifically, G-4 aliens are:

> "(iv) officers, or employees of such international organizations and the members of their immediate families."

In contrast to those classes of aliens who are defined as aliens "having a residence in a foreign country which [they have] no intention of abandoning," 8 U.S.C. § 1101(a)(15)(B), (F), (H), (J), or as aliens who intend to enter the United States "temporarily" or who are "in transit" § 1101(a)(15)(C), (D), (L), a G-4 alien is simply defined as an employee of an international organization. The statute, therefore, does not define a G-4 alien in terms of an express intent on the part of such alien relative to his domicile.

The visa itself held by a G-4 alien is not determinative of the domicile issue. A visa is essentially a document of entry. *Alves v. Alves*, 262 A.2d 111, 115 (D.C. App. 1970); see 22 C.F.R. § 41.120. Its period of validity has no relation to the period of time an alien may be authorized by the immigration authorities to stay in the United States, 22 C.F.R. §41.122(a). The stay of a G-4 alien is governed by regulations of the Immigration and Naturalization Service. 8 U.S.C. § 1184(a). As provided in 8 C.F.R. § 214.1(a):

> "(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall . . . agree that he will abide by all terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or an abandonment of his authorized nonimmigrant status."

The period of admission of a G-4 alien is for so long as the alien continues to be recognized by the Secretary of State as a member of that class of aliens. In terms of the present case, the period of admission of the

plaintiffs' fathers is for so long as they are respectively employed by international organizations governed by the International Organizations Immunities Act, cited *supra*. 8 C.F.R. §§ 214.1(a), 214.2(g).[12]

[9] The mere fact that a G-4 alien is subject to being deported if he changes his employment does not make him legally incapable of establishing a Maryland domicile or of intending to remain or remaining here indefinitely. In *Alves v. Alves, supra,* the District of Columbia Court of Appeals held specifically that a G-4 alien was domiciled in the District of Columbia. In that divorce case the appellant wife challenged the finding of the lower court that her husband was a D.C. domiciliary on the ground here argued that "the appellee did not have the legal capacity to form an intention to become a domiciliary of the District of Columbia since he was living here at the grace of Great Britain and United States." (*Id.*, at 114). The wife also argued that the husband had to adjust his status to permanent resident before he could become domiciled in the District of Columbia.[13] The *Alves* court rejected the last contention holding that under the immigration laws it is legally possible "for an alien to remain in the United States for many years . . . without applying for permanent residence" and that such a contention wrongfully ignores, "the period of time [the alien had] resided in the District of Columbia, his intention in moving into the District of Columbia and other relevant

[12] Under 8 U.S.C. § 1251(a)(9) an alien is subject to deportation who— "(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed . . ., or to comply with the conditions of any such status."

[13] The domicile rule in the District of Columbia as quoted by the court in *Alves* is substantially similar to the Maryland rule:

> ". . . physical presence with an intent to abandon the former domicile and to remain in the District of Columbia for an indefinite period of time." (*Alves, supra,* at 114).

factors." ((Id., at 115). As to the first contention the court held:

> "The fact that appellee entered the United States on a nonimmigrant visa . . . does not preclude a finding that appellee could become domiciled in the District of Columbia.
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> * * * * * *
>
> . . . At best it might be argued appellee had a floating intent to return to Great Britain conditioned upon an uncertain event — his dismissal from the I.M.F. — which event may never occur. But such a floating intention to return to Great Britain is not sufficient to require a holding that appellee was still domiciled in Great Britain." (footnotes omitted). (*Id.*, at 115-116).

Accord, Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. App. 1972); *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 138 A.2d774, *aff'd*, 28 N.J. 73, 145 A.2d 327 (1958). The Court of Appeals of Maryland, as mentioned above, has also held that a floating intent to return to a former domicile at some future date does not negative the intent to establish a new domicile. *Shenton v. Abbott, supra*, at 533, 15 A.2d 906.

The *Restatement (Second) of Conflicts* recognizes in §17, Comment g, that a refugee may acquire a domicile of choice even if he is present in this country on a temporary visa:

> "Even in the latter situation, [refugee present on a temporary visa] it is possible for a refugee to acquire a domicile of choice in his asylum, although the presumably temporary nature of his stay may cast some doubt upon whether he has formed the requisite attitude of mind toward it . . ." (Citations omitted). (*Id.*, at 69).

The *Restatement* also states with respect to domiciliary intent that:

> "[I]f [one] does not intend to move at a definite time, it is easier to find that he has this attitude of mind than if he intends to move at a definite time.

> It is possible, however, for a person to have the proper attitude of mind even though he does intend to move at a definite time; although the more distant that time is, the easier it is to find the requirement satisfied." (*Id.*, at 71).

The rule expressed in *Alves* and in the *Restatement*, as applied to a G-4 alien, who presently intends to remain in Maryland indefinitely but who may have to return to his native country at the conclusion of his employment, makes it clear that such a G-4 alien is not legally incapable of establishing a Maryland domicile. Furthermore, as noted *supra*, there is nothing in the statutory definition in 8 U.S.C. § 1101 of a G-4 alien, as opposed to certain other types of nonimmigrant aliens, which indicates that Congress sought to negate a domiciliary intent on the part of a G-4 alien.

In summary, under Maryland law the plaintiffs' fathers must be able to demonstrate physical presence in Maryland, an intent to remain here indefinitely and the legal capability to do so. The federal immigration laws do not render the plaintiffs' fathers legally incapable of demonstrating and being able to carry out a present intention to remain in Maryland indefinitely. Plaintiffs' fathers' G-4 status, in fact, gives them that precise status, residents of Maryland for an indefinite period of time. This legal capacity coupled with physical presence and sufficient evidence of the requisite intent is all that the law of Maryland requires to establish domicile.

Defendants place principal reliance on Revenue Ruling 74-364 and *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971).

The Revenue Ruling squarely holds that a G-4 alien is under a legal disability which renders him incapable of forming the intention necessary to establish a domicile in the United States. That holding is based on the fact that a G-4 alien is required to depart at the expiration of the period of his admission. However, as demonstrated above, under federal law a G-4 alien is capable of

remaining in Maryland indefinitely and, therefore, has the legal capacity to have the necessary intent to establish a Maryland domicile while physically present in Maryland. As an explication of the *law of domicile,* this court believes the Revenue Ruling is in error.

Revenue Ruling 74-364 relies as do the defendants, on *Seren v. Douglas, supra.* In that case, Seren, a student, entered the United States in 1967 on a student visa which expired in April, 1968. In July of 1968, after Seren had married a University of Colorado coed, a petition for an immigrant visa was granted which entitled him to apply for status as a permanent resident alien. On January 20, 1970, the United States Immigration and Naturalization Service granted Seren the status of "lawful permanent resident." The University of Colorado contended that Seren, who had been a non-student resident of Colorado between April, 1968, and January, 1970, was under a legal disability prior to January 20, 1970, to formulate the requisite intent to become domiciled in Colorado. The University based its contention on the fact that Seren had entered the United States on a student visa and was a nonimmigrant alien classified under 8 U.S.C. § 1101(a)(15)(F)(i) as an alien with "a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . .." With respect to this argument, the court held:

> "We agree that the federal statutes in question did create a legal disability which would render Seren incapable of forming the intent required by state statute *so long as he, in compliance with federal law, was here on a legal basis which bound him to not abandon his homeland.* However, that disability could, as a matter of fact and law, have dissolved upon the expiration of his student visa. At such time he could abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." (Emphasis added).

A G-4 alien is not bound by federal law "to not abandon his homeland" and could at any time "abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." Therefore, the very language of the *Seren* court warrants a holding that a G-4 alien is not under a legal disability to establish a Maryland domicile. The *Seren* court also held that the dissolution of Seren's legal disability was not contingent on his being granted lawful permanent resident status on January 20, 1970, but that the disability dissolved prior to that date.

In Re Gaffney's Estate, 141 Misc. 453, 252 N.Y.S. 649 (1931), also relied on by the defendants, is distinguishable on at least two grounds. That case dealt with whether Patrick Cassidy, who had "arrived in this country only recently" (*id.,* at 652) as a temporary visitor for 3 months only, could qualify under New York law to be appointed as administrator of his brother's estate. New York law rendered incompetent one who was an "alien not an inhabitant of this state." In finding that Cassidy was not competent, the court relied on the fact that Cassidy was present only for 3 months on a visitor's visa and would have to leave the country at the end of that time. As distinguished from Cassidy's situation, the holder of a G-4 visa is not under similar constraints. In noting that, "[A]lienage alone does not disqualify an administrator, but there must be adequate proof of his being an inhabitant" (citation omitted) (*id.,* at 653), the *Gaffney's Estate* court highlighted the second ground upon which that case is distinguishable from this one. Far from deciding that a nonimmigrant alien could never establish a domicile in the United States, the court there decided only that Mr. Cassidy did not establish by competent evidence that he was an "inhabitant" of New York.

[10, 11] The presumption utilized by the University of Maryland in enforcing its "In-State Policy" is that no class of nonimmigrant aliens can establish a Maryland domicile. As such, it is an irrebuttable presumption

which is not universally true since G-4 aliens are not legally incapable of establishing Maryland domicile. That the University has "reasonable alternative means of making the crucial determination" of a nonimmigrant alien's domicile, *Vlandis v. Kline, supra* 412 U.S. at 452, 93 S. Ct. at 2236, is demonstrated by the fact that it makes just such a determination on a case-by-case basis with regard to other students seeking to pay domiciliary tuition rates under its "In-State Policy." The irrebuttable presumption relating to nonimmigrant aliens encompassed by the University's "In-State Policy" therefore is an invalid measure of domicile.[14]

If the University were to seek to justify its treatment of nonimmigrant aliens on the theory of cost equalization, this argument must fail because basing a conclusive presumption of non-domicile on nonimmigrant status would be as stated in *Vlandis* "wholly unrelated to that objective." (*Id.*, at 441, 93 S. Ct. 2230). Nonimmigrant aliens, even those such as plaintiffs' fathers whose salaries are exempt from state income tax, who have resided in Maryland for 10 or 15 years, as have plaintiffs' fathers, might well have contributed far more financial support to the University of Maryland through payment of real property, sales and other taxes than would have a student, financially independent for at least 12 months, who maintained a domicile in Maryland for 6 months prior to his class registration. Yet such a student, who conceivably could have contributed almost nothing to the Maryland tax base, is allowed to prove Maryland domicile under the "In-State Policy." Nor can the University's policy be justified on the ground of administrative certainty or administrative convenience. *Vlandis v. Kline, supra,* at 441, 93 S.

[14] The fact that Congress, empowered by the Constitution and statute to distinguish between citizens and aliens, may legitimately draw lines to establish qualification requirements, under which certain aliens will be eligible for federally funded programs and others will not, does not necessarily raise parallel powers in the States. *See Mathews v. Diaz,* 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

Ct. 2230; *Stanley v. Illinois, supra,* 405 U.S. 656, 92 S. Ct. 1208. *Cf. City of Charlotte v. Local 660, etc.,* 426 U.S. 283, 96 S. Ct. 2036, 48 L. Ed. 2d 636 (1976).

Since the "In-State Policy" of the University of Maryland, as applied to G-4 aliens, creates a constitutionally impermissible irrebuttable presumption, it is not necessary to reach the issues raised by plaintiffs' equal protection and supremacy clause claims.

D. Relief

Declaratory relief and an injunction prohibiting the University of Maryland from denying to the plaintiffs in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) must be granted in this motion for summary judgment.[15] However, in addition plaintiffs also request this court (1) to enjoin the defendants from failing to

[15] Neither declaratory nor injunctive relief with respect to plaintiffs' fathers' tax-exempt status is warranted. Because the University of Maryland automatically determined that the plaintiffs' fathers', as G-4 aliens, were not Maryland domiciliaries, the University never meaningfully applied domiciliary criteria, see *supra,* to the plaintiffs. One of these criteria is whether or not the person whose domicile is being determined pays Maryland income tax on all earned income. The record does not establish that the University would universally deny "in-state" status to students solely on this ground. In fact, the defendants have admitted that a parent holding an immigrant visa could establish Maryland domicile regardless of a Maryland income tax exemption, if that parent could demonstrate the other relevant domiciliary criteria. (Defendants' answers to plaintiffs' requests for admissions, Paper No. 7, ¶ 10). This issue is not ripe for resolution in this case. Since the University of Maryland will be required, henceforth, to review G-4 aliens in the same manner as citizens and immigrant aliens, the court will presume that all of these individuals will be given the same kind of review. The court will also presume that, consistent with the University's admission, it will not preclude any student from establishing that he or she is a domiciliary of Maryland solely because of that student's parent's Maryland tax-exempt status under an international agreement. If the University were to act contrarily, serious constitutional questions would arise.

classify them as in-state students, (2) to certify this suit as a class action, (3) to frame appropriate relief for the class so certified, and (4) to award plaintiffs costs and attorneys' fees.

In order for plaintiffs to prevail on this motion for summary judgment in their request that they be classified as in-state students, the court must find that there is no dispute concerning the facts material to a determination that each of the fathers of the plaintiffs, on whom each plaintiff is dependent, is domiciled in Maryland.

[12] The law in this Circuit governing summary judgment is very strict. In order for summary judgment to be granted there can be no dispute as to any material fact or as to any controlling inference to be drawn from material facts. *American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co.*, 354 F.2d 214, 216 (4th Cir. 1965). The burden is on the plaintiffs to establish that there are no such disputes, and any doubt as to the existence of a disputed material fact or inference drawn therefrom must be resolved against the plaintiffs. *Phoenix Savings and Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967).

Plaintiffs, in attempting to establish that the undisputed facts warrant a holding that their fathers are domiciled in Maryland, rely on their Verified Complaint and the exhibits attached thereto and on the affidavits filed as part of their motion for summary judgment.

[13, 14] Plaintiffs' reliance on the Verified Complaint filed in this case is misplaced. Since the relevant domicile for tuition purposes under the valid portion of the University's "In-State Policy" is the domicile of plaintiffs' fathers, any verification of facts alleged in the complaint by the plaintiffs themselves is of little evidentiary value on the crucial question of the present intent of each father to remain permanently or indefinitely in Maryland. Counsel for the plaintiffs have not filed any affidavits of plaintiffs' fathers in this case which contain relevant evidence of this intent. The

complaint itself is only verified by the plaintiffs with respect to the allegations that pertain to them (Paper No. 1). In addition, the verifications are only on "information and belief." While it is true that sworn and notarized pleadings may sometimes be considered the equivalent of affidavits in summary judgments proceedings, *Fletcher v. Norfolk Newspapers, Inc.*, 239 F.2d 169 (4th Cir. 1956); *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va. 1970), the verified pleadings in those cases contain only facts about which the pleader had personal knowledge and which concerned him directly. In order for a verified complaint to substitute for an affidavit, it must meet the standards of F. R. Civ. P. 56(e), that is it must be made "on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters therein." *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F.2d 150 (5th Cir. 1965); *Avery v. Norfolk & Western Railway Co.*, 52 F.R.D. 356 (N.D. Ohio 1971); 6 J. Moore, *Federal Practice*, ¶ 56.11[3], pp. 56-249-251 and ¶ 56.22[1], pp. 56-1303-1311 (1976). [Hereinafter, *Moore*]. The Verified Complaint in this case does not meet this standard and is inadequate to support plaintiffs' motion for summary judgment.

The fact that defendants filed no opposing affidavits setting out contradictory facts and merely relied on denials in their Answer (Paper No. 3, ¶¶ 16, 18, and 21) concerning facts relevant to plaintiffs' fathers' domicile is not significant in this case. Such denials would have been insufficient under F. R. Civ. P. 56(e) if the plaintiffs had met their burden of establishing that the relevant facts were not in dispute and that they were entitled to judgment as a matter of law. However, if a party moving for summary judgment fails to meet his burden, it is not incumbent upon the opposing party to do anything. *Adickes v. Kress & Co.*, 398 U.S. 144, 159-161, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); F. R. Civ. P. 56(c); 6 *Moore*, ¶ 56.11[3] p. 56-252, ¶ 56.23, p. 56-1390.

[15-17] Of course, under F. R. Civ. P. 56(c) plaintiffs may rely solely on the pleadings and do not have to file any supporting data if they choose not to do so. A motion made by a claimant on the basis of the complaint and answer is functionally equivalent to a motion for judgment on the pleadings under Rule12(c). *Schwartz v. Compagnie General Transatlantique,* 405 F.2d 270 (2d Cir. 1968); 6 *Moore,* ¶56.02[3], p. 56-29; ¶ 56.09; ¶ 56.11[1-1]; ¶ 56.11[2], p. 56-210. However, because of defendants' Answer has raised an issue of material fact with respect to the allegations in the Verified Complaint concerning plaintiffs' fathers' domiciles (Paper No. 3, ¶¶ 16, 18, and 21), plaintiffs may not prevail on this ground either. *Id.;* 2A *Moore,* ¶ 12.15. Since there is nothing in the entire record with respect to the fathers of plaintiffs Hogg and Moreno on which plaintiffs can rely in meeting their burden under Rule 56 on this factual question, this court cannot now enjoin the defendant from failing to classify students Hogg and Moreno as in-state students on the basis of the current record.

With respect to the father of plaintiff Otero, the record does contain some material filed as exhibits to the Verified Complaint which is entitled to consideration on this issue. In the process of attempting to convince the University of Maryland that plaintiff Otero was domiciled in Maryland, Rene Otero, plaintiff's father, partially completed under oath the University of Maryland form entitled "Petition for In-State Classification for Admission, Tuition and Charge-Differential Purposes." This form requires that the parent upon whom the student's domicile depends fill out sections II and IV of the form.

In section II Rene Otero has stated that he occupies real property in Maryland as his domicile on a year-round basis; that he has resided in Chevy Chase, Maryland since March 1, 1965; that all or substantially all of his possessions are in the State of Maryland; that Mrs. Otero is registered to vote in Maryland; that he has a Maryland driver's license and that his car is registered in Maryland. Rene Otero has also filed copies, certified by him to be true copies and sworn to before a notary, of his wife's

Maryland driver's license, his driver's license, his Maryland automobile registration for 3 automobiles, and his son's W-2 forms and Maryland Income Tax form, all listing Chevy Chase as their address. It is also undisputed from the record that Rene Otero is a G-4 alien employed with Inter-American Development Bank; that Mrs. Otero is an American citizen; that Rene Otero has not made any attempt to adjust his status from G-4 to resident alien; and that his current employer has a policy which would prevent him from making that adjustment while he is so employed. While all of these facts are material in the determination of Mr. Otero's domicile, the record is still deficient in evidence concerning his domiciliary intent. This crucial factor of intent is one which is particularly difficult to resolve on the basis of a bare written record and summary judgment can seldom be granted in cases where intent is in issue. *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974); *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). Therefore, even though the court has before it some evidence of Mr. Otero's domicile, summary judgment cannot be entered in favor of plaintiff Juan Pablo Otero.

E. Class Action

[18] Plaintiffs seek to maintain this suit as a class action under F. R. Civ. P. 23 (b)(2) which applies to suits in which:

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

It is clear that the University's actions with respect to classifying G-4 aliens or their dependents as out-of-state students have been taken in accordance with official University policy and thus "on grounds generally applicable to the class." This case is then appropriately brought under 23(b)(2), assuming plaintiffs meet the

additional burdens imposed upon them to establish that this suit should proceed as a class action.

F.R. Civ. P. 23(a) provides 4 additional prerequisites for the maintenance of a class action. A class action may be maintained under Rule 23 only if:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The burden is on the plaintiffs to meet these and all of the requirements for the maintenance of a class action. *Carracter v. Morgan,* 491 F.2d 458 (4th Cir. 1973); *Poindexter v. Teubert,* 462 F.2d 1096 (4th Cir. 1972); *McAdory v. Scientific Research Instruments, Inc.,* 355 F. Supp. 468 (D. Md. 1973). In order to determine if plaintiffs have met their burden, the appropriate class which plaintiffs may represent must be determined.

Plaintiffs seek to represent a class consisting of all persons residing in Maryland who now attend or may in the future wish to attend the University of Maryland and who:

> (a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)-(G)(iv) or are financially dependent upon another person holding or named within such visa; or
>
> (b) pay no Maryland State income tax on a salary or wages from an international organization under the provisions of an international agreement to which the United States is a party or are financially dependent upon another person who does not pay such tax on such salary or wages for such reasons.

Plaintiffs seek declaratory and injunctive relief on behalf of the members of the class.

The thrust of the class aspects of plaintiffs' suit is to force the University to provide an opportunity for

prospective class members to demonstrate Maryland domicile. The court believes that the class which the plaintiffs seek to represent is too broad and must be limited to individuals satisfying criteria (a) above, residing in Maryland, who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish "in-state" status, or who are currently students in senior high schools in Maryland. It is these individuals against whom defendants' policies have already operated or would operate in the near future if they were to continue in effect.

Defendants' proposed limitation of the class to those students, either G-4's or their dependents, who have previously attempted to demonstrate Maryland domicile is too narrow. *Cf. Player v. State of Alabama, Dept. of Pensions and Security,* 400 F. Supp. 249, 253, 259 (M.D. Ala. 1975). Under the University's policy such an attempt would have been futile. Individuals who have been or will soon be discouraged from applying to the University of Maryland because of the University's policies regarding G-4 aliens are appropriate class members. *Cypress v. Newport News General and Nonsectarian Hospital Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967); *Long v. Sapp,* 502 F.2d 34, 43 (5th Cir. 1974); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 254 (3rd Cir. 1975), *cert. denied* 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1976); *cf. Green v. Cauthen,* 379 F. Supp. 361, 371-2 (D.S.C. 1974).

The court finds no merit in defendants' preliminary argument that plaintiffs have abandoned the class action aspects of this suit. Plaintiffs' motion for class certification, filed on November 18, 1975, in a suit instituted on May 27, 1975, and before any hearings on the merits, was timely and allows the court to determine if class certification is appropriate within the "practicable" time limits of Rule 23(c)(1).

Since elsewhere in this opinion the court has already determined that plaintiffs do have standing to sue on their own behalf, defendants' objection to a class action suit on that ground must also fail. Defendants have not disputed, nor could they, that there are "questions of law . . . common to the class" as required by Rule 23(a)(2) since injunctive and declaratory relief for all the class members depends on the resolution of the same question of law, the legality of the University of Maryland's policy prohibiting G-4 aliens an opportunity to show that they are domiciled in Maryland. For the same reason, plaintiffs have also met the "typical claims" requirement of Rule 23(a)(3). Defendants have not attempted to argue to the contrary on this question. Finally, since plaintiffs' able and diligent counsel have adequately and fairly represented the interest of the class heretofore described and since the plaintiffs do not have interests antagonistic to those of the class, Rule 23(a)(4) has been satisfied. *Oxendine v. Williams,* 509 F.2d 1405 (4th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co., supra; American Finance System, Inc. v. Harlow,* 65 F.R.D. 94 (D. Md. 1974).

Defendants' major argument in opposition to class certification is that plaintiffs have not satisfied the "numerosity" requirement of Rule 23(a)(1) which requires the plaintiffs to demonstrate that joinder of all members is impracticable. This rule requires plaintiffs to make a positive showing that joinder is impracticable. *Tolbert v. Western Electric Co.,* 56 F.R.D. 108, 113 (N.D. Ga. 1972). Neither bare allegations of numerosity nor speculation as to the number of parties will suffice. *Kinsey v. Legg, Mason & Co., Inc.,* 60 F.R.D. 91 (D.D.C. 1973); *Tuma v. American Can Co.,* 367 F. Supp. 1178 (D. N.J. 1973). However, a plaintiff need not establish a class size with precision; it is sufficient if he presents some information from which the number of class members can be approximated. *Sims v. Parke Davis & Co.,* 334 F. Supp. 774 (D. Mich. 1971), *cert. denied* 405 U.S. 978, 92 S. Ct. 1196, 31 L. Ed. 2d 254 (1972). In this regard, the Advisory

Committee on the Federal Rules of Civil Procedure noted in discussing Rule 23(b)(2):

> ". . . Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose numbers are incapable of specific enumeration . . ." (citations omitted). 39 F.R.D. 73, 102.

Plaintiffs have submitted the affidavits of Arnold Weiss and John D. North (attachments to Paper No. 16) in support of their motion for class certification. Mr. Weiss's affidavit indicates that as of May, 1975, there were "157 children between the ages of 16-25 holding G-4 visas and dependent on and living in homes of Bank employees living in Maryland." Mr. North indicates that, based on a random sample at the end of 1975 of 15% of the World Bank's employees, just under 1,000 employees holding G-4 visas reside in Maryland. Mr. North, based on hard 1973 data, and ratios based on the 1975 sample, states that "there are today (Jan. 8, 1976), very approximately, nearly 500 dependent children, about one-third of them of the age of 15 or over, living in the homes of World Bank employees who hold G-4 visas and who reside in the State of Maryland." These data are as specific as are required, given the fact that this is a Rule 23(b)(2) class action suit and that plaintiffs have demonstrated the unconstitutionality of the University of Maryland's policies in question here. The court finds that plaintiffs have met the burden imposed on them by Rule 23(a)(1) to demonstrate that the class described *supra* is so numerous that joinder of all members would be impracticable. Therefore the court will grant plaintiffs' motion for class certification for a class to be defined as follows:

> All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of

Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa.

Declaratory relief is granted to the members of this class and defendants are enjoined from denying to the members of this class in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv).

Since the issue of the domicile of the fathers of the three named plaintiffs remains to be resolved, the court will not decide at this time the question of court costs and attorneys' fees.

Therefore, it is this 13th day of July, 1976, ORDERED:

(1) That defendant University of Maryland's motion for summary judgment is GRANTED and the University of Maryland is dismissed as a defendant in this case;

(2) That defendant Dr. Wilson H. Elkins' motion for summary judgment is DENIED;

(3) That plaintiffs' motion for class action determination is GRANTED and that the class is certified as described in the foregoing opinion;

(4) That plaintiffs' motion for summary judgment is partially GRANTED and partially DENIED;

(5) That the "In-State Policy" of the University of Maryland which denies to G-4 aliens by the use of an irrebuttable presumption of non-domicile the opportunity to establish "in-state" status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment; and

(6) That defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's "In-State Policy" with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to "in-state" status for purposes of tuition and charge differential determinations.

In The United States District Court
for The District Of Maryland

Civil Action No. M-76-691

Juan Carlos Moreno, et al.,
Plaintiffs,

v.

University of Maryland and
Dr. Wilson H. Elkins,
President, University of
Maryland,
Defendants.

ORDER
(Filed August 3, 1976)

The Court having read and considered the Motion to Stay Order Pending Appeal and Memorandum in Support thereof, filed on behalf of Defendant Elkins on July 31, 1976;

And the Court having heard oral argument of counsel for the respective parties in open court on August 2, 1976, at which time it was represented by counsel for Defendant Elkins that were a stay granted (1) the University of Maryland, for the fall 1976 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester,

would have been granted but for the stay, would refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, were finally affirmed on appeal, and (2) the University of Maryland would publicize in some reasonable manner the condition that in order to be eligible to be considered for the refund described above, each student whose status is currently determined by a G-4 visa would be required to file with the University of Maryland a request for reclassification to "in-state" status prior to the last day available for registration for the fall 1976 semester;

And the Court having determined from the foregoing pleadings and arguments that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

IT IS, this 3rd day of August, 1976, by the United States District Court for the District of Maryland, for the reasons more fully set forth in open court,

ORDERED, That the Motion to Stay Order Pending Appeal be granted as prayed and that the effectiveness of paragraphs (5) and (6) of the Court's Order contained in its Opinion and Order filed July 13, 1976, be, and the same hereby is, STAYED.

s/ JAMES R. MILLER, JR.,
United States District Judge.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg,
Appellees,

v.

Wilson H. Elkins, President, University of Maryland,
Appellant,

and

University of Maryland,
Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Heard: April 4, 1977
Decided: April 28, 1977.

Before WINTER, BUTZNER, and HALL, Circuit Judges.

Jack T. Roach and Robert A. Zarnoch, Assistant Attorneys General of Maryland (Francis B. Burch, Attorney General of Maryland, David Feldman, Assistant Attorney General of Maryland on brief) for appellant; Alfred L. Scanlan (R. James Woolsey, John

D. Aldock and Shea and Gardner on brief) for appellees.

PER CURIAM:

The University of Maryland appeals the district court's ruling that, for purposes of determining admission, tuition rates, and charge differentials, students may not be denied "in state" status solely because they hold G-4 visas. For the reasons lucidly stated by the district court, we affirm that court's judgment. *See* Moreno v. University of Maryland, 420 F. Supp. 541 (D. Md. 1976).

Affirmed.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Wilson H. Elkins, President,
University of Maryland,
Appellant,

v.

Juan Carlos Moreno, et al.
Appellees.

ORDER
(Filed May 23, 1977)

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II,
Clerk.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Juan Carlos Moreno, Juan Pablo Otero and Clare B. Hogg,
Appellees,

v.

Wilson H. Elkins, President, University of Maryland,
Appellant,

and

University of Maryland,
Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

(Filed May 26, 1977)

Upon consideration of the appellant's motion for stay of mandate,

IT IS ACCORDINGLY ADJUDGED AND ORDERED that the mandate is stayed for a period of thirty (30) days unless the period is extended for cause shown on the same

terms as the district court originally granted its stay namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who filed timely requests for reclassification to "in-state" status would receive a refund of excess fees paid during the pendency of the stay.

Entered for the panel consisting of Judges Winter, Butzner and Hall by direction.

For the Court,

WILLIAM K. SLATE II,
Clerk.

A True Copy,Test:
William K. Slate, II, Clerk,
By Marilyn J. Kocen,
Deputy Clerk.

OPINION

Supreme Court of the United States

Elkins, President, University of Maryland
v
Moreno et al.
(435 U.S. 647 (1978))

Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 77-154. Argued February 22, 1978—Decided April 19, 1978

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 669.

David H. Feldman, Assistant Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Francis B. Burch*, Attorney General, *George A. Nilson*, Deputy Attorney General, and *Robert A. Zarnoch*, *Assistant Attorney General*.

Alfred L. Scanlan argued the cause for respondents. With him on the brief was *James R. Bieke*.*

* A brief for the American Council on Education et al. as *amici curiae* urging reversal was filed by *Sheldon Elliot Steinbach* and by the Attorneys General of their respective States as follows: *Robert F. Stephens* of Kentucky, *Francis X. Bellotti* of Massachusetts, *Anthony F. Troy* of Virginia, *Avrum Gross* of Alaska, *Carl R. Ajello* of Connecticut, *Richard R. Wier, Jr.*, of Delaware, *Arthur K. Bolton* of Georgia, *Wayne L. Kidwell*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, representing a class of nonimmigrant alien residents of Maryland,[1] brought this action against the University of Maryland[2] and its President, petitioner Elkins, alleging that the University's failure to grant respondents "in-state" status for tuition purposes violated various federal laws,[3] the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the University's procedures for

of Idaho, *Theodore L. Sendak* of Indiana, *William J. Guste, Jr.*, of Louisiana, *Joseph E. Brennan* of Maine, *A. F. Summer* of Mississippi, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *David H. Souter* of New Hampshire, *William F. Hyland* of New Jersey, *Toney Anaya* of New Mexico, *Louis J. Lefkowitz* of New York, *Rufus L. Edmisten* of North Carolina, *Allen I. Olson* of North Dakota, *James A. Redden* of Oregon, *Daniel R. McLeod* of South Carolina, *William Janklow* of South Dakota, *Robert B. Hansen* of Utah, *M. Jerome Diamond* of Vermont, *Chauncey H. Browning, Jr.*, of West Virginia, and *V. Frank Mendicino* of Wyoming.

[1] The class certified by the District Court differs from that alleged in the complaint. As certified, the class is defined as:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

"(a) hold or are named within a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa." *Moreno v. University of Maryland*, 420 F. Supp. 541, 564 (Md. 1976).

[2] The University was dismissed from the suit on the authority of *Monroe v. Pape*, 365 U.S. 167 (1961). See 420 F. Supp., at 548-550.

[3] The complaint alleged that petitioner's conduct violated 42 U. S. C. §§ 1981, 1983, 2000a, 2000a-1, 2000a-3, 2000d. App. 3A. Jurisdiction was predicated on 28 U.S.C. §§ 1343 (3), 1343 (4). The District Court proceeded on the premise that 42 U.S.C. § 1983 and the cited sections of Title 28 gave jurisdiction and a cause of action. See 420 F. Supp., at 548. Neither of these rulings is now in dispute.

determinining in-state status violated principles established in *Vlandis v. Kline*, 412 U. S. 441 (1973), and the Court of Appeals affirmed. *Moreno v. University of Maryland*, 420 F. Supp. 541 (Md. 1976), affirmance order, 556 F.2d 573 (CA4 1977). We granted certiorari to consider whether this decision was in conflict with *Weinberger v. Salfi*, 422 U. S. 749 (1975). 434 U. S. 888 (1977).

Because we find that the federal constitutional issues in this case cannot be resolved without deciding an important issue of Maryland law "as to which it appears . . . there is no controlling precedent in the Court of Appeals of [Maryland]," Md. Cts. & Jud. Proc. Code Ann. § 12-601 (1974), we first decide some preliminary issues of federal law and then certify the question of state law set out *infra*, at 668-669, to the Maryland Court of Appeals.

I

In 1973 the University of Maryland adopted a general policy statement with respect to "In-State Status for Admission, Tuition, and Charge-Differential Purposes." In relevant part, this statement provides:

> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> "b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7.

The term "domicile" is defined as "a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland." *Id.*, at 8. The policy statement also sets out eight factors to be considered in determining domicile, of which one is whether a student, or the persons on whom he is dependent, pays "Maryland income tax on all earned income including all taxable income earned outside the State." *Id.*, at 9.

In addition to establishing criteria for conferring in-state status, the general policy statement establishes an administrative regime in which a person seeking in-state status initially files documentary information setting out the basis for his claim of domicile. See *id.*, at 8-9. If the claim is denied, the person seeking in-state status may appeal, first through a personal interview with a "campus classification officer," then to an "Intercampus Review Committee (IRC)," and finally to petitioner Elkins, as President of the University. See *id.*, at 9-10.

II

In 1974, respondents Juan C. Moreno and Juan P. Otero applied for in-state status under the general policy statement. Each respondent was a student at the University of Maryland and each was dependent on a parent who held a "G-4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U.S.C. § 1101.(a)(15)(G)(iv) (1976 ed.).[4] Initially, respon-

[4] "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

"(G) . . . (iv) officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families."

Respondents Moreno and Otero are dependents of employees of the Inter-American Development Bank. App. 6A, 7A. Respondent Hogg is the dependent of an employee of the International Bank for Reconstruction and Development. *Id.*, at 9A. The

dent Moreno was denied in-state status because "neither Mr. Manuel Moreno nor his son, Juan Carlos, are Maryland domiciliaries." Record 41. Respondent Otero was denied in-state status because he was neither a United States citizen nor an alien admitted for permanent residence. *Id.*, at 80.

These respondents took a "consolidated appeal" to the IRC, which also denied them in-state status in a letter which stated:

> "The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.
>
> "You have raised the question of domicile. It is our opinion that a holder of a G-4 visa cannot acquire the requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile." *Id.*, at 51, 86.

A final appeal was made to President Elkins, who advised Moreno and Otero as follows:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education

complaint states that respondent Moreno has resided in Maryland for 15 years, Otero for 10 years, and Hogg for 5 years. *Id.*, at 4A.

between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as 'out-of-state.'

"The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification." App. 12A.

Respondent Clare B. Hogg's experience was similar. Her application for in-state status was initially refected because:

"[T]he policy for the determination of in-state status limits the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria [*sic*] in determination of domicile." Record 106.

However, the IRC stated on appeal:

"It is the opinion of the IRC that a holder of a non-immigrant visa, including the G-4 visa you hold, cannot acquire the requisite intent to reside per-

manently in Maryland, such intent being necessary to establish domicile." *Id.*, at 111.

No mention was made of failure to pay taxes or of repondents' nonimmigrant status. See *ibid.* Yet on final appeal to President Elkins, these reasons, as well as respondent Hogg's lack of domicile, were recited in a letter virtually indentical to those sent respondnets Moreno and Otero as grounds for denying in-state status. See App. 13A.

Unable to obtain in-state status through the University's administrative machinery, respondents filed a class action against the University and petitioner Elkins, seeking a declaration that the class should be granted in-state status and seeking permanently to enjoin the University from denying in-state status to any present or future class member on the ground that such class member or a parent on whom such class member might be financially dependent

> "(a) is the holder of a G-4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty." *Id.*, at 11A.

The District Court, on cross-motions for summary judgment, limited the relief granted to a declaration and enforcing injunction restraining petitioner Elkins from denying respondents "the opportunity to establish 'in-state' status" solely because of an "irrebuttable presumption of non-domicile." 420 F. Supp., at 565. The court specifically refused to grant respondents in-state status, holding that the facts with respect to the respondents' fathers, on whom each respondent was dependent, were in dispute. *Id.*, 564-565. Similarly, the court did not indicate whether the University could or could not exclude respon-

dents because their fathers paid no Maryland state income taxes.[5]

[5] The District Court did not set out reasons for denying this relief. However, it must have believed that the University would not exclude respondents from in-state status solely for cost-equalization reasons if they otherwise qualified for Maryland domicile. If this was not the case, the District Court could not, as it did, see 420 F. Supp., at 560, have found it unnecessary to pass on respondents' argument that the Supremacy Clause prohibits the States from penalizing those who seek to avail themselves of tax exemptions granted by federal treaties. Moreover, an examination of the pleadings before the District Court strongly suggests that, notwithstanding the correspondence set out above, the University has disavowed any intention to exclude respondents from in-state status solely because they, or the persons on whom they are dependent, paid no state income taxes. Thus, the University unequivocally denied respondents' allegation that

"(b students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty . . . may not be granted in-state status because of the 'principle of cost equalization' and because the University's 'policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not' . . . ." App. 5A (Complaint ¶13 (b)).

See App. 16A (Answer ¶13). The University similarly disavowed any intent to exclude respondents solely on the basis of failure to pay state income taxes in its responses to respondents' requests for admission. See Record 134 (¶2(d)) (denying that tax exemption given some G-4 visa holders is "relevant to the determination made pursuant to the . . . University of Maryland policy"); *id.*, at 135 (¶3 (d)) (same); *id.*, at 139 (¶6 (d)) (same); *id.*, at 136 (¶4 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on less than 50% of his earned income); *id.*, at 141 (¶8 (d)) (same); *id.*, at 142 (¶9 (d)) (same); *id.*, at 140 (¶7 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on only "unearned" income). Finally, the University admitted as fact that

"an 'immigrant student' who is financially dependent upon a parent who is an immigrant lawfully admitted for permanent residence . . . may be granted in-state status, whether or not the parent on whom such student is financially dependent currently pays Maryland income tax, provided that such parent

With respect to the "irrebuttable presumption" issue, the District Court first held that, although each respondent had been allowed to submit a complete statement of facts supporting his or her claim of domicile to University authorities, there had been no individualized hearing because the University had a "predetermined conclusion concerning the domicile of a G-4 alien," *id.*, at 555, namely, that a G-4 could not have the requisite intent to establish domicile. It then ruled that aliens holding G-4 visas could as a matter of Maryland common law become Maryland domiciliaries so long as such aliens were legally capable of changing domicile as a matter of *federal* law. See *id.*, at 555-556. An examination of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, demonstrated that G-4 aliens, as distinguished from some other classes of aliens, had the legal capacity to change domicile as a matter of federal law. See 420 F. Supp., at 556-559. Accordingly, the University's irrebuttable presumption that G-4 aliens could not become Maryland domiciliaries was not universally true. Since "reasonable alternative means of making the crucial [domicile] determination," *Vlandis v. Kline*, 412 U. S., at 452, were readily at hand, the University's policy violated the Due Process Clause of the Fourteenth Amendment. See 420 F. Supp., at 559-560. These conclusions were affirmed by the Court of Appeals for the Fourth Circuit, which adopted the reasoning of the District Court. App. to Pet. for Cert. 54a-55a.

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can exhibit all of the other relevant domiciliary criteria . . . ." *Id.*, at 142.

Since no party has suggested a difference between immigrant and nonimmigrant aliens other than the possibility that the latter cannot become domiciliaries, the University's admission tends to confirm that the tax issue is not determinative of in-state status for any group of aliens.

For the reasons set out above, we, like the District Court, do not now decide whether the University would be barred by the Supremacy Clause from denying in-state status on tax grounds.

III

A

In this Court, petitioner argues that the University's in state policy should have been tested under standards set out in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and its progeny, since in petitioner's view these cases have effectively overruled *Vlandis*. As an alternative argument, petitioner asserts that the District Court should be reversed because its conclusions on points of Maryland and federal law were erroneous and in fact it is universally true that a G-4 visa holder cannot become a Maryland domiciliary.

Respondents reply that *Vlandis* was distinguished, not overruled, by *Salfi*, and, as distinguished, *Vlandis* covers this case. Moreover, they assert that the District Court correctly interpreted federal and Maryland law. Because the University's policy would on this view discriminate against a class of aliens who could become Maryland domiciliaries, they also argue, as they did in the District Court,[6] that they should prevail on equal protection grounds even if they cannot prevail under *Vlandis*.[7] Cf. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

Although the parties argue this case in terms of due process, equal protection, and *Vlandis* versus *Salfi*, the gravamen of their dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland. The University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its "paramount" and controlling concern is with domicile as defined

[6] The District Court did not pass on the equal protection argument. See 420 F. Supp., at 560.

[7] The respondents also argue that the University's policy is invalid under the Supremacy Clause since control over aliens and over foreign relations is vested exclusively in the Federal Government. We have no need to reach this argument at this time.

by the courts of Maryland.[8] It has eschewed any interest in creating a classwide exolusion based solely on nonimmi-

[8] Petitioner will be surprised to learn from the dissent, see *post*, at 672-676, that the University's treatment of respondents is not really determined by the Maryland common law of domicile and therefore that this case is governed by *Weinberger v. Salfi*, 422 U.S. 749 (1975), not *Vlandis v. Kline*, 412 U.S. 441 (1973). For petitioner's view of the University's policy, contrary to that suggested by the dissent, has consistently been: "The Defendant University distinguishes between *domiciliaries* and *non-domiciliaries* of the State of Maryland . . . . This represents a policy decision of the Board of Regents of the University, which has been implemented in the rules and guidelines of the Policy Statement . . . ." Record 215 (emphasis added). And again: "The wording of the 'In-State' policy is structured so as to initially deny 'in-state' status to non-immigrant aliens. This structure incorporates the determination that under the law and definition of *domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile." *Id.*, at 217 (emphasis added). And again: "[The University's] actions and policy *rest upon a definition, not a presumption*. Defendants have denied Plaintiffs 'in-state' status based on an evaluation of their domicile under Maryland law: the existence of a G-4 visa is merely a single operative fact, *albeit paramount, which is placed in the context of what Defendants have determined to be the definition of domicile established by the Maryland courts*." *Id.*, at 231 (second emphasis added). And again: "This distinction [between immigrant and nonimmigrant aliens] was based upon a reading of the Maryland law of domicile in conjunction with the terms and conditions of the non-immigrant visas described in 28 [*sic*] U. S. C. § 1101 (a)(15)(A) through (L), a determination thereby having been made that non-immigrants do not have the intent requisite for establishing Maryland domicile. . . . That State University's [*sic*] can establish such . . . 'domicile' policies and make distinctions between domiciliaries and non-domiciliaries is well established . . . ." *Id.*, at 233.

Indeed, respondents argued below against abstention, see n. 15, *infra*, on the same grounds now argued by our Brother REHNQUIST against certification, namely: "[T]he Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed. Such common law principles, standing alone, do not set the tuition charged by the University of Maryland." Record 272. And petitioner countered: "What [respondents] apparently fail to

grant status[9] or, apparently, on the fact that many G-4 aliens receive earned income that is exempt from Maryland taxation.[10] Because petitioner makes domicile the "paramount" policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State "purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue." *Weinberger v. Salfi*, 422 U.S., at 771.[11]

If we are to reverse the courts below, therefore, we must overrule or further limit *Vlandis* as, of course, petitioner has asked us to do. Before embarking on a review of the constitutional principles underlying *Vlandis*, however, proper concern for *stare decisis* joins with our longstanding

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understand is that the [University's] 'In-State Policy' is structured upon and reflects [the University's] understanding of the Maryland common law of domicile." *Id.*, at 340.

[9] There can be no doubt that, notwithstanding the policy statement's express reservation of in-state status to United States citizens and immigrant aliens, see *supra*, at 651, the University has no policy of excluding nonimmigrant aliens simply because they lack immigrant status under federal law. Petitioner's answer unequivocally states that the University has not "denied" nor does it "continu[e] to deny in-state status to all students who neither are United States citizens nor hold immigrant visas," App. 16A, although such an across-the-board denial would be required by the University's policy if it placed independent significance on immigrant status. Moreover, petitioner tells us that "the fact of alienage is completely irrelevant in itself to the issues controlling a determination of domicile." Record 232.

[10] See n.5, *supra*. Indeed, although the dissent suggests that petitioner might bar respondents on cost-equalization grounds, see *post*, at 672-673, it is clear that petitioner has not done this although nothing in the District Court's injunction prohibits petitioner from doing so. See *supra*, at 655-656, and n.5.

[11] In fact, the University allows evidence to be submitted bearing on respondents' claims of domicile — it simply does not evaluate that evidence.

policy of avoiding unnecessary constitutional decisions to counsel that a decision on the continuing vitality of *Vlandis* be avoided unless it is really necessary. See, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-151 (1976); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Harrison v. NAACP*, 360 U.S. 167, 177 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); cf. *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). So far, no such showing of necessity has been made out.[12] If G-4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfi* for any "irrebuttable presumption" would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G-4 aliens were the Maryland courts to hold that G-4 aliens can have the requisite intent.[13]

[12] Moreover, respondents' equal protection claim turns on whether it is in fact true that G-4 aliens can become domiciliaries of Maryland. If they cannot, the constitutional issues that would be raised are materially different from those briefed or argued here. For this reason, we also think certification proper. See, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-151 (1976).

[13] "The core of Plaintiffs' cause of action is their belief that under Maryland law a G-4 non-immigrant alien can be domiciled in this State. A judicial determination in the negative would foreclose their Constitutional and statutory arguments; *a determination in the affirmative would require the University's Board of Regents to rewrite the In-State policy to accommodate this category of domiciliaries.*" Record 239-240 (emphasis added).

Similar sentiments are expressed in petitioner's brief in this Court. See Brief, at 11, 12, 28, 30, 34, and 35 n.20. And petitioner's counsel stated at oral argument that if the Court of Appeals of Maryland determined that a person with a G-4 visa is capable of forming the requisite intent to establish domicile, "the odds are reasonably high that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents . . . ." Tr. of Oral Arg. 14-15.

Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents[14] we first set out the correct meaning of federal law in this area and then *sua sponte* certify[15] this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question.[16]

[14] No recent Maryland case has been cited in the briefs either here or below. In addition, petitioner's counsel, an Assistant Attorney General of Maryland, stated at oral argument that there "are no Maryland decisions one way or the other." *Id.*, at 10.

[15] Although petitioner asked the District Court to abstain, Record 211, he did not ask that court to certify the state-law question of domicile to the Maryland Court of Appeals. We need not decide whether the District Court's failure to abstain was erroneous, for, as we noted in *Bellotti v. Baird, supra,* at 150-151:

"This Court often has remarked that the equitable practice of abstention is limited by considerations of '"the delay and expense to which application of the abstention doctrine inevitably gives rise"' . . . As we have also noted, however, the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.'. . .

". . . [T]he availability of certification greatly simplifies [*Pullman* abstention] analysis." (Footnotes omitted.)

[16] Although it is our frequent practice to defer to a construction of state law made by a district court and affirmed by a court of appeals whose jurisdiction includes the State whose law is construed, see, *e.g., Bishop v. Wood,* 426 U.S. 341, 345-346, and 346-347, n.10 (1976) (collecting cases), we do not do so here for two reasons. First, the question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged member of the polity of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens) fully in its governance. Second, the status of the many foreign nationals living in Maryland is of great

B

Petitioner has argued, and respondents do not appear to disagree, that, if as a matter of federal law a nonimmigrant alien is required to maintain a permanent residence abroad or must state that he will leave the United States at a certain future date, then such an alien's subjective intent to reside permanently or indefinitely in a State would not create the sort of intent needed to acquire domicile. It is not clear whether this argument is based on an understanding of the common law of Maryland defining intent or whether it is based on an argument that federal law creates a "legal disability," see Restatement (Second) of Conflict of Laws § 15 (1) (1971), which States are bound to recognize under the Supremacy Clause. See *Nyquist v. Mauclet*, 432 U.S., at 4; *id.*, at 20 n.3 (REHNQUIST, J., dissenting); *Seren v. Douglas*, 30 Colo. App. 110, 114-115, 489 P.2d 601, 603 (1971) (semble); *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 574-575, 138 A.2d 774, 779 (semble), aff'd, 28 N.J. 73, 145 A.2d 327, (1958); *Gosschalk v. Gosschalk*, 28 N.J. 73, 75-82, 145 A.2d 327, 328-331 (1958) (dissenting opinion). But cf. *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971). In any case, we need not decide the effect of a federal law restricting nonimmigrant aliens postulated above, since it is clear that Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain.

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importance to Maryland because it potentially affects Maryland's relations with the Federal Government, other state and local governments in the greater District of Columbia area, and foreign nations. In a federal system, it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it. In so doing, we emphasize that we do not in any way suggest that the District Court's determination of Maryland law was incorrect.

After extensive study, Congress passed the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* (1976 ed.), as a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents. See H. R. Rep. No. 1365, 82d Cong., 2d Sess., 27 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess., 1-2 (1952). As amended in 1976, the Act establishes two immigration quotas, one for the Eastern and one for the Western Hemisphere.[17] The object of the quotas is to limit the number of aliens who can be admitted to the United States for permanent residence. To this end, the Act divides aliens into two classes. The first class, immigrant aliens, includes every alien who does not fall into an exclusion established by § 101 (a)(15) of the Act, 66 Stat. 167, as amended, 8 U.S.C. § 1101 (a)(15) (1976 ed.). Except for immigrant aliens who are "immediate relatives of United States citizens" or "special immigrants defined in section 101 (a)(27),"[18] each alien admitted for permanent residence or who later becomes eligible for permanent residence is chargeable against a quota and no alien can be granted permanent residence status unless a quota allocation is available.[19] However, it is important to note that there is no requirement in the Act that an immigrant alien have an intent to stay permanently in the United States.

The second class of aliens, nonimmigrant aliens, is established by § 101 (a)(15) of the Act. This section creates 12 subcategories of aliens who may come to the United States without need for a quota allocation. See §§ 101 (a)(15)(A)-(L). Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be

[17] Immigration and Nationality Act Amendments of 1976, § 2, 90 Stat. 2703, amending § 201 of the 1952 Act, as amended, 8 U.S.C. § 1151 (1976 ed.).

[18] § 201 of the 1952 Act, as amended, 8 U.S.C. § 1151 (1976 ed.).

[19] 8 U.S.C. § 1151 (1976 ed.).

admitted to the United States from time to time and all of which would be hampered if every alien entering the United States were subject to a quota and to the more strict entry conditions placed on immigrant aliens.[20]

Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus, the 1952 Act defines a visitor to the United States as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. § 101 (a)(15)(B). Similarly, a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . ." § 101 (a)(15)(F). See also § 101 (a)(15)(C) (aliens in "immediate and continuous transit"); § 101 (a)(15)(D) (vessel crewman "who intends to land temporarily"); § 101 (a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning").

By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Moreover, since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported, see § 241 (a)(9) of the 1952 Act, 66 Stat. 206, 8 U.S.C. § 1251 (a)(9) (1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of

[20] See S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 1, p. 13 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess., 52 (1952); H. R. Rep. No. 91-851, pp. 5-7 (1970).

status (discussed below), nonimmigrants in restricted classes who sought to establish domicile would be deported.

But Congress did *not* restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under § 101 (a)(15)(G)(iv).[21] Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G-4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile. Congress' intent is confirmed by the regulations of the Immigration and Naturalization Service, which provide that G-4 aliens are admitted for an indefinite period — so long as they are recognized by the Secretary of State to be employees or officers (or immediate family members of such employees or officers) of an international treaty organization. See 8 CFR § 214.2 (g) (1977); 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.13b, p. 2-101 (rev. ed. 1977). Whether such an adoption would confer domicile in a State would, of course, be a question to be decided by the State.

Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status. *Ibid.* Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant.

[21] See n.4, *supra*.

Beginning with the 1952 Act, Congress created a mechanism, "adjustment of status," through which an alien already in the United States could apply for permanent residence status. See § 245 of the 1952 Act, 66 Stat. 217, as amended, 8 U.S.C. § 1255 (1976 ed.).[22] Prior to that time, aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad. See 2 Gordon & Rosenfield, *supra*, at § 7.7. Although adjustment of status is a matter of grace, not right, the most recent binding decision[23] of the Board of Immigration Appeals states:

> "Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, *etc.*, will be considered as countervailing factors meriting favorable exercise of administrative discretion. *In the absence of adverse factors, adjustment will ordinarily be granted,* still as a matter of discretion." *Matter of Arai*, 13 I. & N. Dec. 494, 496 (1970) (emphasis added), modifying *Matter of Ortiz-Prieto*, 11 I. & N. Dec. 317 (BIA 1965).

The adverse factors referred to by the Board include such things as entering the United States under fraudulent circumstances[24] or committing crimes while in the United

[22] Until the Immigration and Nationality Act Amendments of 1976, n.17, *supra*, nonimmigrant aliens whose country of origin was in the Western Hemisphere were excluded from adjustment of status. Section 6 of the 1976 Amendments, 90 Stat. 2705, removed this restriction. See 8 U.S.C. § 1255 (1976 ed.).

[23] Opinions of the Attorney General, the Board of Immigration Appeals, and of Immigration and Naturalization Service officers published in Administrative Decisions Under Immigration and Nationality Laws of the United States are "binding on all officers and employees of the Service in the administration of the [1952] Act." 8 CFR §§ 3.1 (g), 103.3 (e), and 103.9 (a) (1977).

[24] See, *e.g.*, *Matter of Rubio-Vargas*, 11 I. & N. Dec. 167 (BIA 1965); *Matter of Vega*, 11 I. & N. Dec. 337 (BIA 1965); *Matter of*

States.[25] There is no indication that any named respondent is subject to any such adverse factor, and, given each named respondent's alleged length of residence in the United States,[26] it would appear that any respondent could adjust his or her status to that of a permanent resident without difficulty.[27]

C

For the reasons stated above, the question whether G-4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law. Therefore, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code,[28] the following question is certified to the Court of Appeals of Maryland:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as

Diaz-Villamil, 10 I. & N. Dec. 494 (BIA 1964); *Ameeriar v. INS*, 438 F.2d 1028 (CA3), cert. dismissed, 404 U.S.801 (1971). See also *Matter of Barrios*, 10 I. & N. Dec. 172 (BIA 1963); *Brownell v. Carija*, 102 U.S. App. D. C. 379, 254 F.2d 78 (1957); *Brownell v. Gutnayer*, 94 U.S. App. D. C. 90, 212 F.2d 462 (1954).

[25] See, *e.g.*, *Matter of Marchena*, 12 I. & N. Dec. 355 (Regional Comm'r 1967); *Matter of F——*, 8 I. & N. Dec. 65 (Asst. Comm'r 1958). See generally Annot., 4 ALR Fed. 557 (1970).

[26] See n.4, *supra*.

[27] Cf. *Matter of Penaherrera*, 13 I. & N. Dec. 334 (Dist. Director 1969). Although this is a class action, see n.1, *supra*, there is no reason on the present record to believe that G-4 aliens as a class are less qualified for adjustment of status than are the class representatives.

[28] "§ 12-601. Jurisdiction granted to Court of Appeals.

"The Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States . . . when requested by the certifying court if there is involved in any proceeding before the certifying court a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying

a matter of state law of becoming domiciliaries of Maryland?"[29]

*So ordered**

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The University of Maryland, like all state universities, differentiates in tuition between "in-state" and "out-of-state" students. The two categories of students are delineated in the University's general policy statement on "In-State Status for Admission, Tuition, and Charge-Differential Purposes." Part 1 of the policy statement provides:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes *to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:*
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for

court there is no controlling precedent in the Court of Appeals of this state."

"§ 12-602. Invocation of subtitle.

"This subtitle may be invoked by an order of any court referred to in § 12-601 upon the court's own motion or upon the motion of any party to the cause."

"§ 12-603. Certification order.

"(a) *Form.* — A certification order shall set forth:

"(1) The question of law to be answered; and

"(2) A statement of all facts relevant to the question certified showing fully the nature of the controversy in which the question arose."

[29] The majority rule appears to be that within a single State "the rules of domicile are the same for all purposes." Restatement (Second) of Conflict of Laws, § 11, Comment *o*, p. 47 (1971). Should Maryland not follow this rule, we presume that the Court of Appeals will direct its attention to domicile for the purposes of this case.

* [REPORTER'S NOTE: Subsequently, the Maryland Court of Appeals answered the certified question, and a supplemental decision was rendered in *Toll v. Moreno*, 441 U. S. 458 (1979).]

at least six consecutive months prior to the last day available for registration for the forthcoming semester[, or]

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7 (emphasis added).

As is clear from the policy statement, domicile is not the sole criterion upon which the University of Maryland determines "in-state" tuition status. The University first looks to see whether the student is either a "United States citizen" or an "immigrant alien lawfully admitted for permanent residence"; if the student satisfies this initial requirement, the University must then determine whether the student (or his parents) are domiciled in Maryland.

Respondents are nonimmigrant aliens who hold G-4 visas. Pursuant to the University's tuition policy, they were denied lower in-state tuition rates despite the fact that they and their parents reside in Maryland. As explained by the Assistant Director of Admissions in a letter to respondent Clare B. Hogg, the principal reason for classifying respondents as out-of-state students for purposes of tuition was nonimmigrant status; as a secondary factor, the Assistant Director of Admissions noted that respondents would probably not be able to pass the second hurdle of domicile:[1]

"[T]he policy for determination of in-state status limits the ability to establish an in-state classification

[1] In rejecting the appeals of respondents Moreno and Otero from tuition decisions of the Intercampus Review Committee, petitioner President of the University of Maryland also emphasized that the University precludes nonimmigrant aliens from in-state tuition status for reasons other than solely domicile:

"It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens

to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria in determination of domicile." Record 106.

Respondents brought suit in federal court alleging that the University's in-state tuition policy is, among other things, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court for the District of Maryland held that the University's policy creates an irrebuttable presumption in contravention of *Vlandis v. Kline*, 412 U.S. 441 (1973). The Court of Appeals for the Fourth Circuit affirmed. We granted certiorari to decide whether the lower courts were correct in their holding.

The Court, rather than deciding the due process issue upon which certiorari was granted, today certifies the following question to the Court of Appeals of Maryland:[2]

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lawfully admitted for permanent residence. *Furthermore*, such individuals (or their parents) must display Maryland domicile.

. . .

"The University's classification policy *also* distinguishes between domiciliaries and non-domiciliaries of Maryland." App. 12A (emphasis added).

See also Record 34, 55, 80, and 115.

[2] As the Court notes, *ante*, at 668-669, n.28, the question certified to the Court of Appeals of Maryland may not be answerable by a simple "yes" or "no." The Court asks as a general matter whether respondents are "incapable as a matter of state law of becoming domiciliaries of Maryland." The answer may be that they are incapable of establishing Maryland domicile for university tuition purposes but are still capable of becoming domiciliaries for other purposes such as divorce and personal jurisdiction. While in *Williamson v. Osenton*, 232 U.S. 619, 625 (1914), this Court expressed doubt whether the

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"

I would unhesitatingly join the Court's certification if I felt that resolution of the question posed to the Court of Appeals of Maryland were necessary to decide the issue before us. But I am convinced that we can decide the due process issue without resolution of Maryland domicile law and thus that certification will only result in needless delay.

The University apparently classifies nonimmigrant aliens as out-of-state students for a number of reasons. All parties agree that a major factor is the University's conclusion that nonimmigrant aliens lack the legal capacity to become Maryland domiciliaries for tuition purposes. But this is not the *only* consideration underlying the classification, as is evidenced by the fact that citizenship or immigrant status is a requirement separate from and preceding domicile. According to the President of the University of Maryland, for example, the classification policy also "reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not." App. 12A. Holders of G-4 nonimmigrant visas are exempt from state income tax. By charging such nonimmigrant aliens higher out-of-state tuition, the University is able to better "equalize" the cost of education.[3]

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definition of domicile ever varies depending on the purpose for which domicile is being used, various state-court opinions since 1914 have shown that observation to be incorrect. See, *e.g.*, *In re Estate of Jones*, 192 Iowa 78, 82, 182 N.W.229 (1921). The relevant issue in this case, of course, is whether respondents may establish Maryland domicile for university purposes, not whether they may become domiciled for purposes of divorce, etc.

[3] As the Court recognizes, *ante*, at 656-657, n.5, the University of Maryland does not presently preclude students from

Because the University's conclusion as to domicile plays a major role in its decision not to award nonimmigrant aliens in-state tuition status, counsel for petitioner admitted at oral argument that "it is entirely possible that the university would change its policy" in the face of a contrary decision by the Maryland Court of Appeals. Tr. of Oral Arg. 9. But a change in the University's in-state tuition policy would be neither automatic nor inescapable. The University might still decide that the other considerations such as cost equalization by themselves dictate continuation of the current policy. According to counsel for petitioner, "that judgment is one that would be made by the regents, and [as] I have suggested previously . . . it is well within the discretion of the regents." *Id.*, at 15.

The above facts clearly establish that the University of Maryland has not created an irrebuttable presumption. The University has not determined that domicile is the sole relevant factor in determining tuition rates and then prevented respondents from presenting proof on the question of domicile.[4] Instead, the University has decided that,

in-state tuition status *solely* because their parents pay no state income tax. However, the record clearly demonstrates that cost equalization is *one* of the major concerns that have led the University to charge higher tuition rates to nonimmigrant aliens.

[4] The Court does not appear to argue that domicile is the *sole* reason for the University of Maryland's out-of-state classification of nonimmigrant aliens. Instead, the Court concludes that domicile is the "'paramount' and controlling concern" of the University. *Ante*, at 659, and n.8. The Court supports its conclusions not with citations from the pleadings or affidavits of the parties but with references to briefs and memoranda filed by their counsel. Counsel for petitioner is, of course, charged with the legal defense of the validity of the policy statement promulgated by the Board of Regents and enforced by petitioner, but counsel is not authorized, in the absence of more authority than is shown here, either to rewrite or to predict how the Regents might rewrite its policy. Thus whatever the "surprise" that the Court foresees petitioner will experience from the view taken of the Regents' policy statement, see *ante*, at 659 n.8, will stem not from this dissent but from the Court's willingness to attribute to ambiguous statements by counsel for a state agency

for a number of reasons *including* domicile and cost equalization, nonimmigrant aliens should pay a higher tuition rate than citizens and immigrant aliens who are domiciled in the State. A student is allowed to present any and all evidence relevant to his or her status as a citizen or immigrant alien. In *Vlandis v. Kline*, this Court held only that were a State *"purport[s] to be concerned with residency*, it might not at the same time deny to one seeking to meet its test of residency the opportunity to

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the implied authority to rewrite the agency's regulations or to predict the manner in which the agency might rewrite them. Even the selected statements of counsel do not unequivocally support the Court's conclusion. As noted earlier, *supra*, at 673, while counsel for petitioner suggested that "the odds are reasonably high" that the University will modify its policy if the Court of Appeals of Maryland concludes that G-4 aliens can become domiciled in Maryland, he also emphasized that the University's other concerns, such as cost equalization, might lead the Regents to continue out-of-state classification of nonimmigrant aliens. Domicile, in other words, is not the sole concern of the University and may well not even be a "controlling concern." See also Brief for Petitioner 29-32; Tr. of Oral Arg. 19-21 (out-of-state classification of nonimmigrant aliens "serve[s] many purposes other than measuring domicile"; "the policy . . . is clearly intended to serve other purposes").

Even if the University declined to accord in-state tuition status to nonimmigrant aliens *solely* because of the University's conclusion that nonimmigrant aliens cannot be domiciled in Maryland for tuition purposes, no irrebuttable presumption would be presented. In *Vlandis v. Kline*, 412 U.S. 441 (1973), the University *presumed* that a student who was not domiciled in Connecticut at the time he first enrolled at the University of Connecticut could not become a Connecticut resident while attending the University, even though all the normal indicia of residence might be acquired during this period. Here, on the other hand, the University of Maryland merely reads Maryland law as holding that nonimmigrant G-4 aliens cannot satisfy the requirement for Maryland domicile for tuition purposes. This is purely and simply a question of state law. Respondents do not accuse petitioner of employing a nonuniversal, yet irrebuttable, presumption, but rather of misinterpreting Maryland domicile law. If the University of Maryland has misinterpreted state law, this is an error to be resolved by state, not federal, courts; no issue of federal constitutional law is presented.

show factors clearly bearing on that issue. 412 U.S., at 452." *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975) (emphasis added).[5] Here, the University of Maryland's classification policy

> "does not purport to speak in terms of the bona fides of [domicile], but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Id.*, at 772.

Because it is clear that the University of Maryland has not created an irrebuttable presumption of non-Maryland domicile, it is unneccessary to decide, as the Court apparently believes it is, whether "any 'irrebuttable presumption' would be universally true." *Ante*, at 661. And while the case may become moot *if* the Court of Appeals of Maryland decides that holders of G-4 visas can establish Maryland domicile and *if* the University changes its policy in light of that decision, the case is *not* moot *now* and there is no certainty that it will become moot in the future. There is, in summary, nothing today that prevents the Court from deciding the question presented.[6]

[5] Because the tuition policy of the University of Maryland is controlled by *Weinberger v. Salfi* and not *Vlandis v. Kline*, the Court need not decide, as *amici* 29 States urge us to do, whether *Vlandis* should be overruled.

[6] Some Members of the Court may believe that resolution of the state domicile issue would be helpful in resolving respondents' equal protection claim. If the Court of Appeals of Maryland decides that nonimmigrant aliens holding G-4 visas

While I cannot join in what I view as a needless and time consuming certification, I do join in the Court's implied disapproval of the District Court's refusal to refer to Maryland courts the question of whether holders of G-4 visas can establish Maryland domicile. Upon concluding that the University's policy creates an irrebuttable presumption, the District Court was faced with the question of whether the presumption is universally true. The District Court proceeded to answer the question in the negative and enjoin the University's policy, even though

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cannot establish Maryland domicile for tuition purposes, *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), clearly establishes that the University of Maryland can deny such nondomiciliaries lower in-state tuition rates without violating the Equal Protection Clause of the Fourteenth Amendment. If the Court of Appeals decides that holders of G-4 visas can establish Maryland domicile, on the other hand, resolution of respondents' equal protection claim may rest on the proper interpretation of *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

The only question presented by the petition for certiorari, however, is:

"Whether the decisions below should have applied Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and erroneously concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to non-immigrants holding G-4 visas establishes an. irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?" Consideration of respondents' equal protection claim, which was never addressed below, may best be left initially to the lower courts on remand. Even if the Court ultimately decides to consider respondents' equal protection arguments, resolution of Maryland domicile law would seem irrelevant. Unlike the situation in *Nyquist*, the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6, and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. See *Starns v. Malkerson, supra.*

petitioner had asked the District Court either to abstain or, apparently, to certify the question of domicile to the Court of Appeals of Maryland.[7] Because the Court of Appeals of Maryland had never addressed the question of domicile, petitioner's request should have been granted. By deciding the question itself, the District Court risked invalidating a state policy that a later decision of the Maryland state courts might establish was clearly valid. Furthermore, as the Court emphasizes, "it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." *Ante*, at 663 n.16.

In summary, I agree with the Court that important and controlling issues of state law should initially be decided

[7] According to petitioner, he "urged both the district court and the court of appeals to defer to Maryland courts the question of whether the state law precluded G-4's from establishing Maryland domicile." Brief for Petitioner 35 n.20. The record indicates that petitioner, in his answer to respondents' complaint, urged the District Court to "abstain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland." Record 117. Petitioner renewed the request in his motion for summary judgment and memorandum in support thereof. *Id.*, at 211, and 239-243. In reply, respondents urged the District Court, "should [it] elect to abstain, . . . to use the certification procedure provided by the Uniform Certification of Questions of Law Act, Ann. Code of Md., Courts and Judicial Proceedings, §§ 12-601-609 (1974). Under that Act the Court of Appeals of Maryland is empowered to answer questions of state law certified to it by the United States District Court which may be determinative and as to which it appears there is no controlling precedent." *Id.*, at 274. Respondents also went on to argue, however, that the District Court need neither abstain outright nor certify the question of domicile to the Court of Appeals of Maryland, since "the Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed." *Id.*, at 272. The District Court, although concluding that the Maryland law of domicile *is* relevant, declined to either abstain outright or certify the question of domicile to the Court of Appeals of Maryland.

by state, not federal, courts. But because I do not believe that resolution of the Maryland law of domicile is necessary to decide the due process question before us, I dissent from today's certification.[8]

[8] While I agree with the Court's conclusion that holders of G-4 visas are not prevented *as a matter of federal law* from establishing Maryland domicile, I find it unnecessary to address the five pages of dicta that accompany that conclusion. I am nonetheless troubled by the Court's unsupported dictum that the United States may not be able to deport, under certain unspecified circumstances, a G-4 alien who terminates his employment with an international treaty organization. *Ante*, at 667.

Supreme Court of the United States

No. 77-154

Wilson H. Elkins, President, University of Maryland,
Petitioner,

v.

Juan Carlos Moreno, et al.

CERTIFICATION ORDER

(Filed April 25, 1978)

It appearing, as more fully set forth in the opinion of the Court filed in this matter on April 19, 1978, that there is involved in this case a question of law of the State of Maryland which may be determinative of this case, as to which it further appears that there is no controlling precedent in the Court of Appeals of Maryland, this Court, pursuant to Subtitle 6 of Title 12 of the Maryland Courts and Judicial Proceedings Code, hereby certifies to the Court of Appeals of Maryland, and hereby respectfully requests that Court to answer, the following question:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" It is the opinion of this Court that the facts relevant to the question certified are set out in the Court's opinion in this case.

And, accordingly, it is further ORDERED:

> That Wilson H. Elkins, President, University of Maryland, be designated as the appellant in the Certification Procedure before the Court of Appeals of

Maryland. See Maryland Rules of Procedure, Rule 896(a)(iv);

And it is further ORDERED:

That the Clerk of this Court shall transmit to the Court of Appeals of Maryland certified copies of this order, the opinion of this Court rendered herein on April 19, 1978, and the briefs, appendix, and record filed in this Court in this matter;

And it is further ORDERED:

That this Court shall retain jurisdiction of this matter and that the proceedings in this Court shall be held in abeyance until further order of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States.

Dated this 25th day
of April, 1978.

OPINION

Court of Appeals of Maryland

John S. Toll, President, University of Maryland

v.

Juan Carlos Moreno et al.

(284 Md. 425, 397 A.2d 1009 (1979))

[Misc. No. 2, September Term, 1978.]

Decided February 21, 1979.

The cause was argued before MURPHY, C. J., and SMITH, DIGGES, *LEVINE, ELDRIDGE, ORTH and COLE, JJ.

David H. Feldman, Assistant Attorney General, with whom were *Francis Bill Burch, Attorney General,* and *Robert A. Zarnoch, Assistant Attorney General,* on the brief, for appellant.

Alfred L. Scanlan, with whom were *Shea & Gardner, James R. Bieke, John Townsend Rich* and *Raymond M. Bernstein* on the brief, for appellees.

ELDRIDGE, J., delivered the opinion of the Court.

The Supreme Court of the United States, pursuant to the Uniform Certification of Questions of Law Act, Maryland Code (1974), § 12-601 *et seq.* of the Courts and Judicial Proceedings Article, requests that we answer the following question of law:

* *Reporter's Note*: Levine, J., participated in the hearing of the case and in the conference in regard to its decision but died prior to the adoption of the opinion by the Court.

"Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Elkins v. Moreno*, 435 U.S. 647, 669, 98 S. Ct. 1338, 1351, 55 L. Ed. 2d 614 (1978).

The facts pertinent to this question are as follows. The named plaintiffs in this class action, Juan C. Moreno, Juan P. Otero and Clare B. Hogg, are all nonimmigrant aliens attending the University of Maryland,[1] and they have all resided in Maryland for substantial periods of time.[2] The three students are financially dependent upon nonimmigrant parents who are employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Development. As such, the plaintiffs are in this country under "G-4 visas," which is a nonimmigrant visa issued to "officers, or employees . . . of international organizations, and members of their immediate families" pursuant to 8 U.S.C. § 1101(a)(15)(G)(iv). The parents of these plaintiffs, as employees of international organizations, are by treaty exempted from federal and state taxes on their organization salaries. However, any other monies earned are fully subject to applicable federal and state income taxes.

The controversy is over these students' status for tuition purposes at the University of Maryland. Moreno, Otero and Hogg sought "in-state" tuition status at the school. The University has established a general policy statement which sets forth standards for determining under what

[1] "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

"(G) . . . (iv) officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families." 8 U.S.C. § 1101 (a) (15).

[2] Moreno has lived in Maryland for 15 years, Otero for 10 years and Hogg for 5 years.

circumstances "in-state status for admission, tuition and charge-differential purposes" should be granted. It provides:

> *"General Policy*
>
> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> * * * * * *
>
> "2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.
>
> * * * * * *
>
> *"Definitions*
>
> "1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. . . .
>
> * * * * * *
>
> "4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time. . . ."

As part of the University's policy statement, several criteria are set forth for determining domicile:

> "a. Own or rent and occupy real property in Maryland as one's domicile on a year-round basis.

"b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

"c. Maintain within the State of Maryland all or substantially all personal possessions.

"d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

"e. Register all owned motor vehicles in Maryland.

"f. Possess a valid Maryland driver's license, if licensed.

"g. Register to vote in Maryland, if registered.

"h. Give a Maryland home address on federal and state income tax forms."

Moreno's application for in-state status was denied based on the school's determination that neither he nor his father were Maryland domiciliaries. Otero was refused in-state status because he was not a United States citizen nor an alien admitted for permanent residence to this country. Upon denial of their applications, in accordance with University procedures, Moreno and Otero appealed to the Inter-campus Review Committee. The Review Committee also denied the requests, stating:

"The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.

"You have raised the question of domicile. *It is our opinion that a holder of a G-4 visa cannot acquire the*

requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile." (Emphasis supplied.)

After the refusal by the Review Committee to grant Moreno and Otero in-state status, a final intra-school review was sought from the President of the University. He also refused their requests, stating:

"It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as 'out-of-state.'

"The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, *it is my opinion, and the position of the University, that the terms and conditions of a G-4 nonimmigrant visa preclude establishing the requisite intent necessary for Maryland domicile.* Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification." (Emphasis supplied.)

The third plaintiff, Clare B. Hogg, was also denied in-state status. Her application was initially rejected by the University because:

"[T]he policy for the determination of in-state status limits the ability to establish an in-state

classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification, as this is an important criterion in determination of domicile."

She took an appeal to the Review Committee, which said:

". . . [A] holder of a non-immigrant visa, including the G-4 visa you hold, cannot acquire the requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile."

A final administrative appeal was taken to the University President, and he rejected the application for reasons similar to those given plaintiffs Moreno and Otero.

Receiving no relief from within the University, the plaintiffs filed a class action against the school and its President in the United States District Court for the District of Maryland.[3] Plaintiffs sought injunctive and declaratory relief for themselves and other similarly situated students covered by a G-4 visa, alleging that the defendant's refusal to give them in-state status violated

[3] The District Court certified the following class:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa." Moreno v. University of Maryland, 420 F. Supp. 541, 564 (1976).

various federal statutes, as well as the Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution.[4]

In the District Court the plaintiffs maintained, *inter alia*, that the University's policy created an irrebuttable presumption of non-domicile in violation of the Due Process Clause of the Fourteenth Amendment. The University adopted, the plaintiffs argued, an irrebuttable presumption that G-4 visa holders are incapable of establishing Maryland domicile, a fact that is not always true. On the other hand, the defendant asserted that in-state status is determined by the Maryland common law of domicile, and that the very terms and conditions of a G-4 visa prohibit these nonimmigrant aliens from establishing Maryland domicile.

The United States District Court, in an opinion by Judge James R. Miller, Jr., determined that there was nothing in Maryland law to prevent the plaintiffs from being domiciled in this State. It also found that the terms and conditions of a G-4 visa under federal law did not render the plaintiffs legally incapable of being domiciled here. Relying on *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the District Court held that the University's "In-State Policy" amounts to a constitutionally impermissible irrebuttable presumption which is not universally true. *Moreno v. University of Maryland*, 420 F. Supp. 541, 559-560 (D. Md. 1976).[5] The court then ordered the defendant President to allow the named plaintiffs, and others of the class, the opportunity to demonstrate that they are entitled to in-state status. The defendant took an appeal to the United States Court of

[4] Under the authority of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the University was dismissed from the suit. However, the President of the University, in his official capacity, remained as a defendant. *See* 420 F. Supp. at 548-550.

[5] In view of the District Court's holding on the due process issue, that court deemed it unnecessary to consider the plaintiffs' alternative contentions, 420 F. Supp. at 560.

Appeals for the Fourth Circuit, which affirmed the District Court's decision, *Moreno v. Univ. of Maryland*, 556 F.2d 573 (4th Cir. 1977).

The defendant's petition for a writ of certiorari was granted by the Supreme Court of the United States. There, the University President maintained that the lower federal courts were in error in concluding that under Maryland law and federal law a G-4 visa holder can become a domiciliary of this State. In addition, the President of the University defended the constitutionality of the University's position, asking the Supreme Court to "overrule or further limit *Vlandis* [*v. Kline, supra*]." 435 U.S. at 660.

Applying the principle that decisions on constitutional issues should be avoided unless necessary, the Supreme Court expressed the view that no such showing of necessity had been made out, and that an answer to the question whether G-4 aliens were capable of becoming domiciliaries under federal law and Maryland common law might be dispositive of the case. The Court explained (435 U.S. at 661-662):

> "If G-4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfi* for any 'irrebuttable presumption' would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can have the requisite intent.
>
> "Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents, we first set out the correct meaning of federal law in this area and then *sua*

sponte certify this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question."

The Supreme Court went on to consider whether federal law prevented a person holding a G-4 visa from establishing a domicile in this State. The Court, while recognizing that generally nonimmigrant aliens may be viewed as "temporary visitors" to the United States, held that there was no legislative intent to preclude G-4 aliens from having a United States domicile. The Court sated that "it is clear that Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain." *Id.* at 664. It concluded that any of the plaintiffs in this case could attain the status of a "permanent resident without difficulty." *Id.* at 668.

After dealing with the plaintiffs' status under federal law, the Supreme Court then certified to us the issue of whether such persons are "incapable as a matter of state law of becoming domiciliaries of Maryland." *Id.* at 669.

I.

In this Court, the first argument made by the defendant University President is that, irrespective of the general Maryland law of domicile, the University is authorized under state law[6] to establish such rules for tuition fees as it sees fit, and in this connection, to define "residence" as it shall determine. The University President argues that even if G-4 aliens possess the legal capacity to become Maryland domiciliaries, the school has the independent legal authority to apply a more restrictive standard which would exclude persons under G-4 visas from consideration for in-state status.[7]

[6] Code (1957, 1975 Repl. Vol.), Art. 77A, § 15 (e), now Code (1978), § 13-104 (b) of the Education Article.

[7] Consistent with this view, the Board of Regents of the University passed a resolution on June 23, 1978, declaring that:

"The Board of Regents deems it statutory authority under the laws of Maryland to include the power, right, or

In response, the plaintiffs assert that the question of the school's authority to adopt its own standards for in-state status is not before this Court, and that the question certified for our consideration is limited to whether Maryland common law renders G-4 visa holders incapable of becoming domiciliaries of this State.

We agree with the plaintiffs in this regard. The specific question certified, in light of the Supreme Court's opinion in this case, is whether a person covered by a G-4 visa can become, *as a matter of Maryland common law,* a domiciliary of this State. The question concerns the general Maryland law of domicile and not the specific authority of the University under the Education Article of the Code. This is clear from the Supreme Court's opinion.

In setting forth its view of the dispute in this case, the Supreme Court stated (435 U.S. at 658-660, emphasis supplied):

> "The University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement it's 'paramount' and controlling concern is with domicile as defined by the courts of Maryland. It has eschewed any interest in creating a classwide exclusion based solely on nonimmigrant status or, apparently, on the fact that many G-4 aliens receive earned income that is exempt from Maryland taxation. Because *petitioner makes domicile the 'paramount' policy consideration* and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger v. Salfi,* 422 U.S. at 771."

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privilege to adopt a more restrictive definition of domicile for purposes of according in-state status for admissions, tuition, and charge-differentials than may be applicable generally or otherwise under the Maryland common law."

This understanding of the defendant University President's position was based in part on the defendant's statement that "'the "In-State Policy" is structured upon and reflects [the University's] understanding of the Maryland *common law of domicile*.'" (Emphasis supplied.) *Id.* at 660 n.8 The Supreme Court's majority opinion specifically disputed the dissent's view of the issues in the case (which view the defendant is apparently now attempting to adopt for the first ime in this Court), saying (*id.* at 659 n.8, emphasis in original):

> "Petitioner will be surprised to learn from the dissent . . . that the University's treatment of respondents is not really determined by the Maryland common law of domicile and therefore that this case is governed by *Weinberger v. Salfi*, 422 U.S. 749 (1975), not *Vlandis v. Kline*, 412 U.S. 441 (1973). For petitioner's view of the University's policy, contrary to that suggested by the dissent, has consistently been: "The Defendant University distinguishes between *domiciliaries* and *nondomiciliaries* of the State of Maryland . . . This represents a policy decision of the Board of Regents of the University, which has been implemented in the rules and guidelines of the Policy Statement . . ." Record 215 (emphasis added). And again: "The wording of the "In-State" policy is structured so as to initially deny "in-state" status to non-immigrant aliens. This structure incorporates the determination that under the law and definition of *domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile.'"

A further indication that the Supreme Court was concerned with the Maryland common law of domicile is evidenced by its comment that

> "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens

> were the Maryland courts to hold that G-4 aliens can have the requisite intent." *Id.* at 661.

And counsel for the University President stated in oral argument to the Supreme Court

> "that if the Court of Appeals of Maryland determined that a person with a G-4 visa is capable of forming the requisite intent to establish domicile, 'the odds are reasonably high that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents . . .'" *Id.* at 661-662 n.13.

Based upon this examination of the Supreme Court's opinion, it is evident that the defendant changed his position. In short, prior to the present proceedings in this Court, the University President maintained that the Maryland common law of domicile prevented G-4 aliens from having in-state status. Here, in a marked departure from his earlier position, the defendant insists that regardless of the general Maryland law of domicile, the University has the authority to adopt more restrictive standards for in-state status at the University. We concur with the plaintiffs that the certified question concerns the Maryland common law of domicile, and that the defendant's arguments relating to the University's power to adopt different criteria for in-state status are beyond the scope of the question. "[T]he Uniform Certification of Questions of Law Act, Code (1974), §§ 12-601 *et seq.*, of the Courts and Judicial Proceedings Article, does not authorize us to go beyond the questions certified in the order of the certifying court." *Krashes v. White*, 275 Md. 549, 557, 341 A.2d 798 (1975). Consequently, we shall confine our discussion to the Maryland common law of domicile and its effect upon persons covered by G-4 visas.

II

The defendant's remaining contentions in this Court do purport to relate to the general Maryland law of domicile.

First, he contends that, under Maryland common law, domicile is not a unitary concept and that the meaning of domicile varies depending upon the particular context in which the concept is used. The defendant insists that in the present context, the University's policies, of limiting its expenditures and equalizing the costs of public education between those who have and those who have not contributed through income tax payments, compel the conclusion that G-4 visa holders are incapable of establishing a Maryland domicile.

Alternatively, the defendant argues that "[e]ven under domiciliary rules applied in other contexts," the plaintiffs cannot be domiciled in Maryland. In support of this argument, the defendant appears to rely on his assertion that "[m]ost nonimmigrants are neither expected nor permitted to stay here indefinitely," that G-4 visa holders' "lucrative salaries are not subject to State income tax," and that such persons cannot vote in Maryland.

(a)

An examination of the cases in this Court dealing with domicile demonstrates that the defendant's first contention regarding the law of domicile is untenable. The meaning of domicile and the basic principles for determining domicile have been the same in this State regardless of the context in which the issue of domicile arose.

The meaning of domicile and the principles for deciding domicile were recently summarized by Judge Smith for the Court in *Dorf v. Skolnik*, 280 Md. 101, 116-117, 371 A.2d 1094 (1977):

> "A person may have several places of abode or dwelling, but he can have only one domicile at a time. Domicile has been defined as the place with which an individual has a settled connection for legal purposes and the place where a person has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning. The controlling

> factor in determining a person's domicile is his intent. One's domicile, generally, is that place where he intends it to be. The determination of his intent, however, is not dependent upon what he says at a particular time, since his intent may be more satisfactorily shown by what is done than by what is said. Once a domicile is determined or established a person retains his domicile at such place unless the evidence affirmatively shows an abandonment of that domicile. In deciding whether a person has abandoned a previously established domicile and acquired a new one, courts will examine and weigh the factors relating to each place. This Court has never deemed any single circumstance conclusive. However, it has viewed certain factors as more important than others, the two most important being where a person actually lives and where he votes. Where a person lives and votes at the same place such place probably will be determined to constitute his domicile. Where these factors are not so clear, however, or where there are special circumstances explaining a particular place of abode or place of voting, the Court will look to and weigh a number of other factors in deciding a person's domicile."

The Court went on in *Dorf*, quoting from *Bainum v. Kalen*, 272 Md. 490, 499, 325 A.2d 392 (1974), to list many of the other factors to be considered in determining a person's domicile:

> " 'These include such things as: the paying of taxes and statements on tax returns; the ownership of property; where the person's children attend school; the address at which one receives mail; statements as to residency contained in contracts or other documents; statements on licenses or governmental documents; where furniture and other personal belongings are kept; which jurisdiction's banks are utilized; membership in professional, fraternal, religious or social organizations; where one's regular physicians and dentists are located; where one maintains charge accounts; and any other facts revealing contact with one or the other jurisdiction.' "

This Court's decisions involving domicile disclose that the above-quoted principles have been applied in all contexts. The issue of domicile has arisen in a variety of situations. *Dorf v. Skolnik, supra,* and *Bainum v. Kalen, supra,* were concerned with domicile as a qualification for office, as were *Gallagher v. Bd. of Elections,* 219 Md. 192, 148 A.2d 390 (1959), and *Rasin v. Leaverton,* 181 Md. 91, 28 A.2d 612 (1942). The same legal principles were applied in the cases involving domicile as a qualification for voting, *Howard v. Skinner,* 87 Md. 556, 40 A. 379 (1898); *Thomas v. Warner,* 83 Md. 14, 20-21, 34 A. 830 (1896); *Langhammer v. Munter,* 80 Md. 518, 31 A. 300 (1895); *Schaeffer v. Gilbert,* 73 Md. 66, 20 A. 434 (1890). Many other cases involve the totally dissimilar context of domicile for the purpose of administering decedents' estates, *Hall, Admx. v. Morris,* 213 Md. 396, 132 A.2d 113 (1957); *Shapiro v. Marcus,* 211 Md. 83, 124 A.2d 846 (1956); *Shenton v. Abbott,* 178 Md. 526, 15 A.2d 906 (1940); *Pattison v. Firor,* 146 Md. 243, 126 A. 109 (1924); *Brafman v. Brafman,* 144 Md. 413, 125 A. 161, *cert. denied,* 265 U.S. 588, 44 S. Ct. 633, 68 L. Ed. 1193 (1924); *Whiting v. Shipley,* 127 Md. 113, 117, 96 A. 285 (1915). Nevertheless, these cases also set forth the identical principles governing domicile as were summarized in *Dorf v. Skolnik, supra.*

The same is true of the following cases. In *Harrison v. Harrison,* 117 Md. 607, 613-616, 84 A. 57 (1912), the determination of domicile was necessary to decide where a divorce action should have been filed, and in *Walker v. Walker,* 125 Md. 649, 661-665, 94 A. 346 (1915), the domicile of the parties was controlling in deciding whether a divorce decree of another state was entitled to full faith and credit. A number of cases have involved domicile in order to be eligible to file a claim, arising from a motor vehicle accident caused by an uninsured motorist, against the former Unsatisfied Claim and Judgment Fund, *Hawks v. Gottschall,* 241 Md. 147, 152, 215 A.2d 745 (1966); *Walsh, Adm'r v. Crouse,* 232 Md. 386, 194 A.2d 107 (1963); *Maddy v. Jones,* 230 Md. 172, 179-180, 186 A.2d 482

(1962). *Wagner v. Scurlock*, 166 Md. 284, 170 A. 539 (1934), was concerned with domicile because of a statute relating to service of process on non-residents of Maryland in an action based on a motor vehicle accident in this State. Domicile for income tax purposes was an issue in *Comptroller v. Lenderking*, 268 Md. 613, 303 A.2d 402 (1973). Finally, more than one hundred years ago, this Court dealt with the question of one's domicile in the context of a statute restricting the importation of slaves into Maryland, *Ringgold v. Barley*, 5 Md. 186 (1854). All of these cases, involving many diverse matters, reflect the standard definition of domicile and the same basic principles for ascertaining domicile, regardless of the context.

Moreover, cases involving domicile for one purpose have regularly relied upon cases involving domicile for a totally different purpose. *See, e.g., Bainum v. Kalen, supra*, 272 Md. at 497-498; *Comptroller v. Lenderking, supra*, 268 Md. at 617-620; *Maddy v. Jones, supra*, 230 Md. at 180-182; *Shenton v. Abbott, supra*, 178 Md. at 530-533; *Wagner v. Scurlock, supra*, 166 Md. at 291-293. In sum, domicile has been viewed as a unitary concept in Maryland.

It is true, as the defendant in the present case points out, that the rules for determining domicile may be applied differently because of particular circumstances. For example, where a person votes is ordinarily one of the most important factors a court looks to in resolving the issue of his domicile. *Dorf v. Skolnik, supra*, 280 Md. at 117; *Bainum v. Kalen, supra*, 272 Md. at 498. On the other hand, there may be special circumstances in a particular case explaining why a person did or did not vote in a certain place, revealing that the place of voting in that case was not the best indication of where the person intended his domicile to be. *Gallagher v. Bd. of Elections, supra*, 219 Md. at 200; *Wagner v. Scurlock, supra*, 166 Md. at 292. However, such differences in applying the principles of domicile do not depend upon, or vary with, the purpose for ascertaining domicile or the type of case involved. Rather, the differences arise because of the facts in particular cases.

The very nature of domicile, depending upon one's intent as objectively shown by a multitude of factors associated with that particular individual, will result in differences of application. Moreover, in some contexts there may be special statutory or constitutional requirements in addition to domicile, such as being domiciled in a place for a certain duration. *See, e.g., Bainum v. Kalen, supra; Gallagher v. Bd. of Elections, supra.* But this does not mean that the meaning of domicile itself, or the basic rules for determining it, vary with the context. Regardless of some views expressed by commentators,[8] in Maryland, as in the majority of jurisdictions,[9] the meaning and basic principles for determining domicile do not vary depending on the context.

(b)

In his final argument, the defendant University President asserts that even if domicile is a unitary concept, G-4 visa holders are incapable of becoming domiciled in Maryland because most nonimmigrants are neither expected nor permitted to remain here indefinitely, G-4 visa holders' salaries are not subject to Maryland income tax, and they cannot vote in Maryland. In our view, none of these circumstances renders a G-4 visa holder incapable, as a matter of law, from becoming domiciled in this State.

The defendant's reliance upon the assertion that most nonimmigrants are neither expected nor permitted to remain in this country indefinitely was effectively undercut by the Supreme Court's opinion in the instant case. The nature of a G-4 visa, as well as the control over immigration generally, is a matter of federal law, *Nyquist v. Mauclet,* 432 U.S. 1, 97 S. Ct. 2120, 2126, 53 L. Ed. 2d 63 (1977), and cases there cited. If under federal law a particular individual must leave this country at a certain

[8] *See, e.g.,* Reese, *Does Domicile Bear a Single Meaning?,* 55 Col. L. Rev. 589, 597 (1955).

[9] Elkins v. Moreno, 435 U.S. 647, 669 n.29, 98 S. Ct. 1338, 1351 n.29, 55 L. Ed. 2d 614 (1978), citing Restatement (Second) of Conflict of Laws § 11, Comment o, p. 47 (1971).

date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law. It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile. *Dorf v. Skolnik, supra,* 280 Md. at 116-117; *Bainum v. Kalen, supra,* 272 Md. at 497; *Wagner v. Scurlock, supra,* 166 Md. at 292; *Harrison v. Harrison, supra,* 117 Md. at 614.

However, the Supreme Court in the instant case stated that under federal law, holders of G-4 visas did not have to maintain a permanent residence abroad and did not have to leave this country at a certain date. The Court pointed out that Congress was willing to allow nonrestricted nonimmigrant aliens such as G-4 visa holders "to adopt the United States as their domicile." The Supreme Court went on to say that if a G-4 visa holder developed the "intent to stay indefinitely in the United States, he would be able to do so without violating" federal law or the terms of his visa. The Court concluded by stating that a G-4 visa holder could attain the status of "permanent resident without difficulty." *Elkins v. Moreno, supra,* 435 U.S. at 664-668.

In light of the Supreme Court's interpretation of federal law, it is obvious that nothing inherent in the nature of a G-4 visa would render the holder of such visa absolutely incapable of establishing a Maryland domicile. Assuming the correctness of the defendant's assertion that *most* G-4 visa holders will leave this country, if in a particular case one of these individuals is in a minority and, as shown by objective factors, intends for Maryland to be his fixed place of abode and intends to remain here indefinitely, he will have satisfied the Maryland standard for establishing domicile in this State.

The defendant also relies upon the fact that the salaries of G-4 visa holders from international organizations are exempt from Maryland income tax. It is true that where a person pays taxes is one of the many circumstances which

are considered in determining domicile, *Bainum v. Kalen, supra,* 272 Md. at 499. However, "[t]his Court has never deemed any single circumstance conclusive," *Dorf v. Skolnik, supra,* 280 Md. at 117; *Bainum v. Kalen, supra,* 272 Md. at 498. Consequently, of the usual circumstances which are considered under Maryland law to ascertain domicile, no one circumstance will render a person incapable of establishing a Maryland domicile. Instead, all of the factors relating to the different jurisdictions in question must be examined and weighed. *Dorf* at 117; *Bainum* at 498[10]

What we have just said is largely dispositive of the defendant's reliance upon the inability of G-4 aliens to vote in Maryland. Although voting and place of residence are generally considered the most important factors in determining domicile, they are not conclusive. *Dorf* at 117; *Bainum* at 498. Moreover, as previously pointed out, there may be special circumstances involved in particular cases showing that the place of voting, or not voting, was not a good indicator of intent regarding domicile and should be given little weight. *Gallagher v. Bd. of Elections, supra,* 219 Md. at 200; *Wagner v. Scurlock, supra,* 166 Md. at 292. Since a G-4 visa holder could not as a matter of law vote in Maryland even if he desired to, his failure to vote here

[10] In connection with the factor of where one pays taxes, it should be pointed out that G-4 aliens residing in Maryland are subject to Maryland taxes generally, including income tax. However, the portion of their income representing salaries from international organizations is, by treaty, tax exempt. Of course, all treaties made under the authority of the United States are part of the law of Maryland. Constitution of the United States, Art. VI, Cl. 2. In fact, Article 2 of the Maryland Declaration of Rights declares that "all Treaties made . . . under the authority of the United States, are . . . the Supreme Law of the *State*." (Emphasis added.) That one has income which is tax exempt as a matter of law is quite different from the factor that has been deemed significant in prior domicile cases, namely to which jurisdiction does he pay taxes. However, we do not now foreclose the possibility that circumstances could be shown whereby a tax exemption, such as exists here, might have a bearing upon one's intent regarding his domicile.

would seem to indicate little concerning domicile.[11] At any rate, this factor itself clearly does not preclude a G-4 alien from becoming domiciled in Maryland.

Since nothing in the general Maryland law of domicile renders G-4 visa holders, or their dependents, incapable of becoming domiciled in this State, the answer to the certified question is "No."

Question of law answered as herein set forth.
Appellant to pay costs in this Court.

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[11] On the other hand, his continuing to vote elsewhere might be quite significant.

OPINION

Supreme Court of the United States

Toll, President University of Maryland

v.

Moreno et al.

(441 U.S. 458 (1979))

Certiorari to the United States Court of Appeals
For the Fourth Circuit

No. 77-154. Argued February 22, 1978 — Question certified April 19, 1978 — Decided April 30, 1979

PER CURIAM.

This decision supplements *Elkins v. Moreno*, 435 U.S. 647 (1978), decided last Term. Respondents in *Elkins* represented a class of nonimmigrant alien residents of Maryland who either held or were financially dependent upon a person who held a "G-4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U.S.C. § 1101(a)(15)(G)(iv). Respondents were not granted "in-state" status for tuition purposes at the University of Maryland because they were conclusively presumed by the University to be nondomiciliaries of the State. Respondents brought suit against the University and its President, alleging that the University's failure to grant respondents in-state status violated various federal laws, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the

University's procedures for determining in-state status violated principles established in *Vlandis v. Kline*, 412 U.S. 441 (1973), and the Court of Appeals affirmed. *Moreno v. University of Maryland*, 420 F. Supp. 541 (Md. (1976), affirmance order, 556 F.2d 573 (CA 4 1977).

In *Elkins v. Moreno, supra*, we held that "[b]ecause petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger v. Salfi*, 422 U.S. [749,] 771 [1975]." 435 U.S., at 660. Since the applicability of *Vlandis* depended on whether respondents could in fact become Maryland domiciliaries, we certified, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code (1974), the following question to the Maryland Court of Appeals:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Elkins v. Moreno, supra*, at 668-669.

On June 23, 1978, approximately two months after the decision in *Elkins*,* the Board of Regents of the University of Maryland unanimously adopted "A Resolution Clarifying the Purposes, Meaning, and Application of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." In this resolution, the Board of Regents stated, *inter alia:*

* The order certifying the question to the Maryland Court of Appeals was dated April 25, 1978.

"*Purposes and Interests of In-State Policy.* The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

"(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

"(b) achieving equalization between the affected classes of the expenses of providing educational services;

"(c) efficiently administering the University's in-state determination and appeals process; and

"(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

"*Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy because it intends and deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above."

On February 21, 1979, the Maryland Court of Appeals unanimously answered our certified question in the negative, stating that "[s]ince nothing in the general Maryland law of domicile renders G-4 visa holers, or their dependents, incapable of becoming domiciled in this State, the answer to the certified question is 'No.'" *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019. The Maryland Court of Appeals also declined to consider the implications

of the Board of Regents' clarifying resolution, because, although the resolution represented a change of the University's position, the implications of that change were beyond the scope of the certified question. *Id.* at 436-437, 397 A.2d, at 1014-1015.

The Attorney General of Maryland now requests that this case "be restored to the Supreme Court's active docket for further briefing and argument . . ." We must deny this request because the Board of Regents' clarifying resolution has fundamentally altered the posture of the case. Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount" policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi* . . ." *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court. We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

So ordered.

Supreme Court of the United States

No. 77-154

John S. Toll, President, University of Maryland,

Petitioner,

v.

Juan Carlos Moreno, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Fourth Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Court of Appeals in this cause is vacated; and that this cause is remanded to the United States District Court for the District of Maryland for further consideration in light of the Court's opinion and judgment in *Elkins v. Moreno;* opinion and judgment of Court of Appeals of Maryland in *Toll v. Moreno;* and Board of Regents' Clarifying Resolution of June 23, 1978.

April 30, 1979

UNITED STATES CODE

Title 8, Section 1101(a)(15)

The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

(A) (i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

(G) (i) a designated principal resident representative of a foreign government recognized de jure by the United

States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor

cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor. research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

(K) an alien who is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying him or following to join him.

(L) an alien who, immediately preceding the time of his application for admission into the United States, has been

employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

UNIVERSITY OF MARYLAND

DETERMINATION OF IN-STATE STATUS FOR ADMISSION, TUITION, AND CHARGE-DIFFERENTIAL PURPOSES[1]

An initial determination of in-state status for admission, tuition, and charge-differential purposes will be made by the University at the time a student's application for admission is under consideration. The determination made at that time, and any determination made thereafter, shall prevail in each semester until the determination is successfully challenged prior to the last day available for registration for the forthcoming semester. A determination regarding in-state status may be changed for any subsequent semester if circumstances, as later defined, warrant redetermination.

In those instances where an entering class size is established and where an application deadline is stated, in-state conditions for admissions must be satisfied as of the announced closing application date.

General Policy

1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

   a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

[1] Draft of August 31, 1973 as amended on September 7, 1973. Approved by the Board of Regents on September 21, 1973 to become effective with any term of the University beginning on or after January 1, 1974.

b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

c. Where a student is the spouse or a dependent child of a full-time employee of the University.

d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

e. Where a student is a full-time employee of the University of Maryland.

2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases.

3. Each campus of the University will be responsible for making the in-state determination for the prospective or enrolled student.

4. In-state status is lost at any time a financially independent student establishes a domicile outside the State of Maryland. If the parent(s) or other persons through whom the student has attained in-state status establishes a domicile in another state, the student shall be assessed out-of-state tuition and charges six months after the out-of-state move occurs.

5. The terms of this policy will not be applied retroactively.

Definitions

1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person.

Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

2. A parent includes a natural parent, an adoptive parent, a legally-appointed guardian, and a person who stands *in loco parentis* to the student.

3. A spouse is a partner in a legally contracted marriage.

4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

5. The masculine gender of personal pronouns includes the feminine gender.

Application

1. A student requesting redetermination to in-state status who asserts that he is *financially dependent* upon a parent(s) or spouse domiciled in Maryland, as previously defined, will be required to produce by affidavit, in addition to other proof, documentation of the student's earnings for the year immediately preceding the last day of registration for the semester for which the determination is requested. Such documentation shall include relevant income tax returns, statements from employers, and/or federal and state withholding forms. An affidavit showing all expenses of the student for the same period must also be submitted.

2. A student requesting redetermination to in-state status who asserts that he is *financially independent* will be required to present by affidavit documentation cited in paragraph 1.

3. In determining domicile, the University shall take into consideration, but shall not be limited to, the following criteria as they pertain to the individual case:

a. Own or rent and occupy real property in Maryland as one's domicile on a year-around basis.

b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintain within the State of Maryland all or substantially all personal possessions.

d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

e. Register all owned motor vehicles in Maryland.

f. Possess a valid Maryland driver's license, if licensed.

g. Register to vote in Maryland, if registered.

h. Give a Maryland home address on federal and state income tax forms.

N.B. The documentation offered in these instances may be required to be in affidavit form.

Appeals

A student who disagrees with his classification may request a personal interview with a campus classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final.

Implementation

The implementation of this new policy to those eligible for redetermination will require an extended

period of time. It is hoped that a decision in each case will be made within ninety (90) days of a request for redetermination. During this period of time, or any further period of time required by the University, fees and charges based on the previous determination must be paid. If the determination is changed, any excess fees and charges will be refunded.

* * * * * *

NOTE: The deadline for meeting all requirements for an in-state status and for submitting all documents for reclassification is the last day of late registration for the semester the student wishes to be classified as an in-state student.

RESOLUTION

A RESOLUTION CLARIFYING THE PURPOSES, MEANING, AND APPLICATION OF THE POLICY OF THE UNIVERSITY OF MARYLAND FOR DETERMINATION OF IN-STATE STATUS FOR ADMISSION, TUITION, AND CHARGE-DIFFERENTIAL PURPOSES, INSOFAR AS IT DENIES IN-STATE STATUS TO NONIMMIGRANT ALIENS.

WHEREAS, the Board of Regents, on September 21, 1973, approved a policy for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, to become effective with any term of the University beginning on or after January 1, 1974; and

WHEREAS, questions have been raised as to the purposes, meaning, and application of this policy, insofar as it denies in-state status to nonimmigrant aliens; and

WHEREAS, on April 25, 1978, in accordance with its opinion filed April 19, 1978, the Supreme Court of the United States entered a Certification Order in *Elkins v. Moreno,* No. 77-154, requesting the Court of Appeals of Maryland to answer the following question:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"; and

WHEREAS, the Board of Regents is required by it Autonomy Act [Md. Ann. Code art. 77A, § 15(e) (Supp. 1977)] to "exercise with reference to the University of Maryland . . . all of the powers, rights, and privileges that go with the responsibility of management . . . [without being] superseded in authority by any other State board, bureau, department or commission, in the management of the University's affairs."; and

WHEREAS, clarification of the purposes, meaning, and application of the policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, insofar as it denies in-state status to nonimmigrant aliens, might be helpful in the resolution of the issues pending in the aforementioned litigation and, in any event, would be desirable and in the public interest;

NOW, THEREFORE, BE IT RESOLVED, BY THE BOARD OF REGENTS:

(1) *Statutory Authority.* The Board of Regents deems its statutory authority under the laws of Maryland to include the power, right, or privilege to adopt a more restrictive definition of domicile for purposes of according in-state status for admissions, tuition, and charge-differentials than may be applicable generally or otherwise under the Maryland common law.

(2) *Exercise of Authority.* In accordance with its statutory authority under the laws of Maryland, as set forth above, the Board of Regents approved a policy for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes on September 21, 1973, that adopted a definition of domicile which required, among other things, United States citizenship or lawful admission for permanent residence in accordance with the laws of the United States in order to qualify for in-state status.

(3) *Purposes and Interests of In-State Policy.* The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons

who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

(b) achieving equalization between the affected classes of the expenses of providing educational services;

(c) efficiently administering the University's in-state determination and appeals process; and

(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

(4) *Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy because it intends and deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above.

(5) *Transmission of this Resolution.* The Secretary of the Board of Regents is hereby authorized and directed to cause a copy of this Resolution, over the official seal of the University of Maryland, to be transmitted forthwith to:

(a) the Clerk of the Court of Appeals of Maryland, for the information of that Court;

(b) the Clerk of the Supreme Court of the United States, for the information of that Court;

(c) counsel for the University of Maryland; and

(d) counsel for Juan Carlos Moreno, et al.

* * * * * *

I, Samuel H. Hoover, Secretary of the Board of Regents, do hereby certify the foregoing to be a true and correct copy of a resolution adopted by the Board of Regents of the University of Maryland at a meeting of the said Board held in College Park on Friday, June 23, 1978, at which a quorum of the Board was present, that said resolution was

unanimously adopted and the same has not been amended in any respect.

Witness my hand and the official seal of the University of Maryland this 23rd day of June, 1978.

SAMUEL H. HOOVER,
Secretary,
Board of Regents,
University of Maryland.

(SEAL)

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT,
UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
Petitioners,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed June 24, 1981
Certiorari Granted October 5, 1981

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No. 80-2178

IN THE

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OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT,
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Petitioners,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

5/27/75—(1) Complaint.

6/25/75—(3) Answer.

10/6/75—(9) Motion of Plaintiffs for Summary Judgment.

11/4/75—(11) Motion of Defendants for Summary Judgment.

11/18/75—(14) Motion of Plaintiffs for Class Action Determination.

4/9/76—Hearing on all Motions before Miller J.

4/9/76—Argued and held sub curia.

7/13/76—(19) Opinion of Court and Order.

7/31/76—(20) Defendant's Motion for Stay of Order.

7/31/76—(20a) Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit.

8/2/76—Hearing on Motion for Stay.

8/3/76—(21) Order Granting Stay.

4/4/77—Argued and held sub curia in Court of Appeals.

4/28/77—Per Curiam Opinion of 4th Circuit affirming District Court decision.

5/11/77—Appellant's Petition for rehearing and suggestion for rehearing en banc.

5/23/77—Petition for rehearing denied.

5/26/77—Appellant's Motion to Stay Mandate.

5/26/77—Mandate Stayed pending application to U.S. Supreme Court for a writ of certiorari.

7/28/77—Petition for a Writ of Certiorari.

10/11/77—Certiorari granted.

2/22/77—Argued and held sub curia in U.S. Supreme Court.

4/19/77—Opinion of Court certifying question to the Court of Appeals of Maryland.

4/25/78—Certification Order.

2/21/79—Opinion of Court of Appeals of Maryland answering certified question.

4/30/79—Opinion of U.S. Supreme Court vacating judgment of 4th Circuit and remanding case to District Court.

10/31/79—(28) Opinion of the District Court on Due Process question.

11/16/79—(29) Motion of Plaintiffs for leave to file Supplemental Complaint and to Add a Party Plaintiff.

12/17/79—(35) Motion of Plaintiffs for Summary Judgment.

1/28/80—(36) Motion of Defendant for Summary Judgment and Affidavit.

2/4/80—(37) Order of Court granting leave to file supplemental complaint.

2/4/80—(38) Supplemental Complaint.

2/21/80—(39) Answer to Supplemental Complaint.

3/28/80—Hearing on Motions.

3/28/80—Argued and held sub curia.

4/11/80—(43) Order of Court granting motion to add additional party.

4/17/80—(44) Opinion of Court.

4/17/80—(45) Order of Court subdividing Plaintiff Class.

5/30/80—Conference on form of Order before Miller, J.

5/30/80—(46) Order of Court.

5/30/80—(46½) Judgment entered in favor of Plaintiffs.

5/30/80—(47) Motion of Defendant to Stay Order.

5/30/80—(48) Notice of Appeal.

6/2/80—(50) Order Granting Stay.

6/24/80—(52) Amended Judgment.

6/27/80—(53) Amended Notice of Appeal.

1/8/81—Argued and held sub curia in Court of Appeals.

3/26/81—Per Curiam Opinion of 4th Circuit affirming District Court decision.

4/14/81—Appellants' Motion to Stay Mandate.

4/15/81—Order Staying mandate for 30 days.

5/11/81—Order Staying mandate for additional 30 days.

6/9/81—Order Staying mandate pending application for a Writ of Certiorari.

6/24/81—Petition for a Writ of Certiorari.

10/5/81—Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. Opinion of Fourth Circuit filed March 26, 1981.

2. Stay Order of Fourth Circuit filed April 15, 1981.

3. Stay Order of Fourth Circuit filed May 11, 1981.

4. Stay Order of Fourth Circuit filed June 9, 1981.

5. Memorandum of District Court filed October 31, 1979.

6. Memorandum and Order of District Court filed April 17, 1980.

7. Order of District Court filed May 30, 1980.

8. Judgment of District Court filed May 30, 1980.

9. Stay Order of District Court filed May 30, 1980.

10. Amended Judgment of District Court filed June 24, 1980.

11. Opinion and Order of District Court filed July 13, 1976.

12. Stay Order of District Court filed August 3, 1976.

13. Opinion of Fourth Circuit filed April 28, 1977.

14. Order of Fourth Circuit filed May 23, 1977.

15. Stay Order of Fourth Circuit filed May 26, 1977.

16. Opinion of Supreme Court filed April 19, 1978.

17. Certification Order of Supreme Court filed April 25, 1978.

18. Opinion of Court of Appeals of Maryland filed February 21, 1979.

19. Opinion of Supreme Court filed April 30, 1979.

20. Judgment of Supreme Court filed April 30, 1979.

21. United States Code, Title 8, Section 1101(a)(15).

22. University of Maryland, Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes.

23. A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens.

VERIFIED COMPLAINT

(Filed May 27, 1975)

(Action for Declaratory and Injunctive Relief)

1. This is an action by three aliens, each of whom resides in Maryland, against the University of Maryland and the President thereof, alleging violations of federal statutory and constitutional rights and seeking declaratory and injunctive relief against the defendants' denying plaintiffs in-state status for admission, tuition, and charge-differential purposes (hereinafter usually referred to as "in-state status").

2. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983; Section 1977 of the Revised Statutes of the United States, 42 U.S.C. § 1981; Sections 201, 202, and 204 of Title II of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, 2000a-1, and 2000a-3; Section 601 of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d; and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The jurisdiction of this Court is founded upon 28 U.S.C. § 1343(3) and (4).

4. Venue is present by virtue of 28 U.S.C. 1391(b).

5. Plaintiffs bring this action on behalf of themselves and all other persons residing in Maryland who attend, or desire to attend, defendant University of Maryland and: (1) who hold visas under 8 U.S.C. § 1101(a)(15)(G)(iv) (hereinafter "G-4 visas"); or, (2) who are financially dependent upon the holder of such a visa; or, (3) who pay no federal, state, or local income tax on wages or salary from an international organization under the provisions of an international treaty to which the United States is a party; or, (4) who are financially dependent upon one who pays no such tax on such wages or salary under the provisions of such a treaty. The number of members of

such class is sufficiently numerous that joinder of all members is impracticable. There are questions of law or fact presented herein which are common to the entire class of such persons. The claims of the plaintiffs herein are typical of the claims of such class. The plaintiffs will fairly and adequately protect the interests of such class. Defendants have acted on grounds generally applicable to the class in such a way as to make appropriate final injunctive or declaratory relief with respect to the class as a whole.

6. Plaintiff Juan Carlos Moreno is a native of Paraguay; he has resided in Maryland for fifteen years. He is a student at the University of Maryland.

7. Plaintiff Juan Pablo Otero is a native of Bolivia; he has resided in Maryland for ten years. He is a student at the University of Maryland.

8. Plaintiff Clare B. Hogg is a native of the United Kingdom; she has resided in Maryland for the past five years. She is a student at the University of Maryland.

9. The University of Maryland is a public corporation, chartered under Maryland law, Article 77A § 15(a), Anno. Code of Maryland (hereinafter the "University").

10. Dr. Wilson H. Elkins is the President of the University of Maryland and its chief executive officer (hereinafter the "President").

11. Under Article 77A § 15(e), Anno. Code of Maryland, the Board of Regents of the University "shall exercise with reference to the University . . . all the powers, rights, and privileges that go with the responsibility of management. . . ."

12. On September 21, 1973, the Board of Regents approved a new general policy for the determination of in-state status. Under such general policy the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas. Students who are United States citizens

or who hold immigrant visa may, under such policy, be granted in-state status, if *inter alia*, they are: (a) financially dependent on parents domiciled in Maryland for at least six consecutive months prior to the close of registration for the semester in question, or (b) financially independent for the preceding twelve months and have themselves maintained domicile in Maryland for the above six-month period.

13. As indicated in Exhibit 1, Attachment 9, and Exhibit 3, Attachment 7, attached hereto, defendants have further determined that:

(a) students who are neither United States citizens nor hold immigrant visas may not be granted in-state status regardless of whether such students or their families have established domicile in Maryland;

(b) students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty to which the United States is a party may not be granted in-state status because of the "principle of cost equalization" and because the University's "policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not"; and

(c) students or their parents who hold G-4 visas are thereby precluded from establishing the requisite intent to establish domicile in Maryland.

14. The University currently requires students other than in-state students to pay significantly higher fees for tuition and other charges, including board charges in some circumstances, and subjects them to more restrictive standards for admission in some circumstances than it does in the case of in-state students.

15. Plaintiffs Moreno, Otero, and Hogg have pursued each and every avenue of administrative review, including

an unsuccessful appeal to the President, within the University of Maryland of the University's decision to deny them in-state status, and have exhausted all their administrative remedies, prior to seeking relief in this Court.

16. Documents verifying certain facts relevant to the domicile of plaintiff Moreno's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 1, Attachments 1 to 9. Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland.

17. Manuel and Gladys Moreno are domiciled in the State of Maryland.

18. Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland

income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland.

19. Plaintiff Moreno is domiciled in the State of Maryland.

20. Defendants have denied plaintiff Moreno in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Moreno in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

21. Documents verifying certain facts relevant to the domicile of plaintiff Otero's family, all of which were presented to defendants during the administrative review within the University, are appended hereto as Exhibit 2, Attachments 1 to 6. Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland.

22. Rene and Teresa Otero are domiciled in the State of Maryland.

23. Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, secondary schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland.

24. Plaintiff Otero is domiciled in the State of Maryland.

25. Defendants have denied plaintiff Otero in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Otero in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

26. Documents verifying certain facts relevant to the domicile of plaintiff Hogg's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 3, Attachments 1 to 9. Plaintiff Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of

permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Barbara Hogg have filed joint United States income tax returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mrs. Hogg's salary from the International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside any where other than in the State of Maryland.

27. Vincent and Barbara Hogg are domiciled in the State of Maryland.

28. Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary schools, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above; she has no present intention to reside anywhere other than in the State of Maryland.

29. Plaintiff Hogg is domiciled in the State of Maryland.

30. Defendants have denied plaintiff Hogg in-state status, thus subjecting her to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Hogg in-state status defendants have violated and are violating plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

WHEREFORE plaintiffs pray that this Court

(1) Adjudge and declare that the actions of defendants in denying to plaintiffs in-state status for admission, tuition, and charge-differential purposes are unlawful;

(2) Enjoin the defendants to reclassify the plaintiffs as students having such in-state status;

(3) Enjoin the defendants from further denying to any student in-state status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent: (a) is the holder of a

G-4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty.

(4) Grant to plaintiffs costs, reasonable attorneys' fees, and such other relief as may be proper.

Dated: May 27, 1975

Signatures omitted

Exhibit 1, Attachment 9

UNIVERSITY OF MARYLAND

March 19, 1975

Mr. Alfred L. Scanlon
Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Scanlon:

This is to acknowledge your letter of February 24, 1975. I have reviewed the material relating to "out-of-state" classification of Juan C. Moreno and Juan P. Otero, and I concur in the decision of the Intercampus Review Committee. I am, therefore, denying your appeal.

It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as "out-of-state."

The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland,

and because of the underlying principle of cost equalization, I am denying the requests for reclassification.

Sincerely yours,

WILSON H. ELKINS,

President.

Exhibit 2, Attachment 4

February 24, 1975

Mr. Juan Pablo Otero
3500 Shepard Street
Chevy Chase, Maryland 20015

Dear Mr. Otero:

The Intercampus Review Committee considered your appeal at its recent meeting. I regret to tell you that your request for reclassification to in-state status was denied for spring 1975.

The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.

You have raised the question of domicile. It is our opinion that a holder of a G-4 visa cannot acquire the

requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile.

Sincerely yours,

Judith L. Hirsch
Corresponding Secretary
Intercampus Review Committee

Exhibit 2, Attachment 6

April 3, 1975

Ms. Clare B. Hogg
9704 West Bexhill Drive
Kensington, Maryland 20795

Dear Ms. Hogg:

I am writing in reference to your appeal of the denial of your petition for reclassification for the spring 1975 semester.

In my judgment, the policy for the determination of in-state status limits the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria in determination of domicile.

If you wish to appeal my decision, your next appeal is to the University's Intercampus Review Committee. The next

scheduled committee meeting is April 8, 1975. If you wish your appeal to be considered at this meeting, please send your written appeals letter to the attention of Mr. Wayne Sigler no later than the end of the working day April 7, 1975.

I regret that I cannot be of more assistance to you at this time.

Sincerely,

George E. Raley, Jr.
Assistant Director
of Admissions

Exhibit 3, Attachment 9

UNIVERSITY OF MARYLAND

May 14, 1975

Mr. Alfred L. Scanlan
Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Scanlan:

This is to acknowledge your letter of April 30, 1975 appealing the decision of the Intercampus Review Committee concerning the classification of Ms. Clare B. Hogg as an out-of-state resident. I have reviewed all of the material concerning her appeal, and I concur in the decision of the Intercampus Review Committee that she be classified as an out-of-state resident.

It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. The University's classi-

fication policy distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile.

This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes and those who do not.

In reviewing this case, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Ms. Hogg as out-of-state.

Sincerely yours.

WILSON H. ELKINS,
President.

AFFIDAVIT OF ARNOLD H. WEISS

(Filed October 6, 1975)

DISTRICT OF COLUMBIA SS:

Arnold H. Weiss, being first duly sworn, deposes and states as follows:

1. I am the General Counsel of the Inter-American Development Bank, a public international organization located in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article VIII, Section 5(e) of the Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397 provides that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographic basis as possible."

3. Title 1, Section 101(a) of the Immigration and Nationality Act provides for a separate visa classification for officers, or employees of international organizations, and members of their immediate families. 8 USC Sec. 1101(a)(15)(G)(iv).

4. Pursuant to the matters referred to in paragraphs 2 and 3 above, it is the policy of the Bank not to assist any of such persons in adjusting or otherwise changing their visa status from that provided under 8 USC Sec. 1101(a)(15)(G)(iv) to any other visa status.

5. No authorized representative of the Bank files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment); or to my knowledge has ever done so.

6. The three attachments are copies of letters from the files of the Inter-American Development Bank:

(A) May 20, 1965, letter from Dr. Wilson H. Elkins, President of the University of Maryland, to Mr. Paul A. Colborn, Chief of the General Legal Division of the Pan American Union;

(B) December 27, 1965, letter from Mr. Roy M. Walsh, of the Inter-American Development Bank to Mr. G. Watson Algire, Director of Admissions of the University;

(C) January 7, 1966, letter from Mr. Algire to Mr. Walsh, responding to (B) above.

ARNOLD H. WEISS

May 20, 1965

Mr. Paul A. Colborn, Chief
General Legal Division
The Pan American Union
Washington 6, D.C.

Dear Mr. Colborn:

Since receiving your letter of April 13 we have been considering the tuition rates for employees of international organizations. I note from your letter that no income tax, federal or state, is levied on the salaries of non-citizen employees of certain international organizations, and in each case this is by virtue of a treaty. You also say that liability for the state income tax varies with the jurisdiction and that all alien employees of international organizations are exempted from the tax in the State of Maryland.

The tuition rate at the University of Maryland is determined mainly by domicile. Since this is the case, we have decided that it would be fair to all parties concerned to classify in accordance with domicile: that is, for minors, the parents must own (personally) and occupy property in the State of Maryland for a period of six months before

residency status will be granted. For the adult, the same will hold. This ruling is not to be considered retroactive. I believe that this interpretation of our resident and non-resident status is proper and that it will be fair to the employees of the Pan American Union and other international organizations.

With kindest regards, I am

Sincerely yours,

WILSON H. ELKINS,
President.

December 27, 1965

Mr. G. Watson Algire
Dean of Admissions
University of Maryland
College Park, Maryland

Dear Dean Algire:

Last Tuesday, I spoke to Mrs. Will in regard to the attached letter and she recommended that I write to you. My purpose is to receive confirmation from the University of Maryland that the ruling on classification of non-citizen employees in accordance with domicile, as contained in the attached letter, is also applicable to that category of employees in this Bank. Further, I understand that this ruling is applicable to both tuition and boarding rates.

The Inter-American Development Bank is an international organization of which all the members are governments. It was established and is operating under the Agreement Establishing the Bank signed by these governments (copy attached). Article XI of the Agreement establishes, among other things, certain privileges and immunities for officials and employees of the Bank, including immunity from taxation. The United States of America became a member of the Bank pursuant to the

Inter-American Development Bank Act (Public Law 86-147, copy attached). Section 9 of said Act gives full force and effect in the United States to Article XI of the Agreement. The privileges and immunities of the International Organization Privileges and Immunities Act were extended to the Inter-American Development Bank by virtue of Executive Order 1033, April 8, 1960, copy attached.

Should you require any additional information, please do not hesitate to let me know. In the meantime, I thank you for your consideration of this matter and hope that the information contained herein proves sufficient for you to make a decision.

Sincerely yours,

ROY M. WALSH,
Office of Personnel

January 7, 1966

Mr. Roy M. Walsh
Office of Personnel
Inter-American Development Bank
Washington 25, D.C.

Dear Mr. Walsh:

I am replying to your letter of December 27 concerning the classification of Maryland residence for fee-paying purposes at the University.

If you will recall, you enclosed a copy of a letter dated May 20, 1965 from Dr. Wilson H. Elkins to Mr. Paul A. Colborn, Chief, General Legal Division, The Pan American Union. The intent of this decision is to grant Maryland residence status for fee-paying purposes at the University of Maryland to those employees of international organizations who are living in the State of Maryland and are in this country on a G4 visa only. This is, of course, granted in the case of minors provided the parents

personally own and occupy property in the State of Maryland for a period of six months before such residence status is granted. The same privilege is extended to adults.

I hope this answers the questions raised in your letter of December 27.

Sincerely yours,

G. WATSON ALGIRE,
Director of Admissions
and Registrations

AFFIDAVIT OF HUGH N. SCOTT

(Filed October 6, 1975)

DISTRICT OF COLUMBIA SS:

Hugh N. Scott, being first duly sworn, deposes and states as follows:

1. I am Assistant General Counsel of the International Bank for Reconstruction and Development in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article V, Section 5(d) of the Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502 provides that "[i]n appointing the officers and staff, the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographic basis as possible." Pursuant to this requirement for some years it has been neither the policy nor the practice for the Bank to assist any of its employees in adjusting or otherwise changing their visa status from one in which such employee holds a visa under 8 U.S.C. 1101(a)(15)(G)(iv) to one in which he holds an immigrant visa; thus neither the Bank nor its

authorized representative files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment).

HUGH N. SCOTT

ANSWER

(Filed June 25, 1975)

Defendants, University of Maryland and Dr. Wilson H. Elkins, President, University of Maryland, by Francis B. Burch, Attorney General of Maryland, Estelle A. Fishbein, David H. Feldman, and Jack T. Roach, Assistant Attorneys General, their attorneys, in answer to the Verified Complaint* filed herein, state:

First Defense

This Honorable Court lacks jurisdiction over the subject matter of the rights of action alleged in the Complaint.

Second Defense

This Honorable Court lacks jurisdiction over the person of Defendants University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland.

Third Defense

The Complaint fails to state a claim upon which relief can be granted.

Fourth Defense

The Complaint fails to state a claim as a class action upon which relief can be granted.

Fifth Defense

The Complaint fails to state a claim upon which class relief can be granted.

Sixth Defense

The Complaint fails to join parties under Rule 19 of the Federal Rules of Civil Procedure.

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* Although "Verified," the Complaint need not have been since no temporary restraining order was sought, *see* FED. R. CIV. P. 65(b), and thus the verification is of no effect, *see* FED. R. CIV. P. 11.

SEVENTH DEFENSE

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, lack standing to bring the rights of action alleged in the Complaint.

EIGHTH DEFENSE

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, are not proper parties plaintiff to the Complaint.

NINTH DEFENSE

No case or controversy exists between Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, on the one hand, and Defendants, University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland, on the other hand.

TENTH DEFENSE

This Honorable Court should abstrain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland.

ELEVENTH DEFENSE

1. Defendants deny the allegations contained in paragraph 1 of the Complaint, except that Defendants admit that Plaintiffs are aliens.

2. Defendants deny the allegations contained in paragraph 2 of the Complaint.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, except that Defendants admit that Plaintiff Juan Carlos Moreno is a student at the University of Maryland and deny that Plaintiff Juan Carlos Moreno has resided in Maryland for fifteen years.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, except that Defendants admit that Plaintiff Juan Pablo Otero is a student at the University of Maryland and deny that Plaintiff Juan Pablo Otero has resided in Maryland for ten years.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except that Defendants admit that Plaintiff Clare B. Hogg is a student at the University of Maryland and deny that Plaintiff Clare B. Hogg has resided in Maryland for the past five years.

9. Defendants admit the allegations contained in paragraph 9 of the Complaint.

10. Defendants admit the allegations contained in paragraph 10 of the Complaint.

11. Defendants admit the allegations contained in paragraph 11 of the Complaint.

12. Defendants admit the allegations contained in paragraph 12 of the Complaint, except that Defendants deny that the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint and all subparts thereof, except that Defendants admit that they have determined that

students or their parents who hold G-4 visas are precluded from establishing the requisite intent to establish domicile in Maryland.

14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

15. Defendants admit the allegations contained in paragraph 15 of the Complaint.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 1, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years and that they have no present intention to reside anywhere other than in the State of Maryland.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint, except that Defendants deny that Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years and that he has no present intention of residing anywhere other than the State of Maryland.

19. Defendants deny the allegation contained in paragraph 19 of the Complaint.

20. Defendants deny the allegations contained in paragraph 20 of the Complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint, except that

Defendants admit that copies of the documents, appended to the Complaint as Exhibit 2, Attachments 1 to 6, were presented to Defendants during the administrative review within the University, and deny that Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years and that they have no present intention to reside anywhere other than in the State of Maryland.

22. Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, except that Defendants deny that Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years and that he has no present intention to reside anywhere other than in the State of Maryland.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 3, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period of approximately nine months as part of Vincent Hogg's employment, and that they have no present intention to reside anywhere other than in the State of Maryland.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the Complaint, except that Defendants deny that Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above, and that she has no present intention to reside anywhere other than in the State of Maryland.

29. Defendants deny the allegation contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint.

WHEREOF, Defendants respectfully pray that:

(1) The relief requested in the Complaint be denied.

(2) All costs of these proceedings be assessed against Plaintiffs.

Signatures omitted.

UNIVERSITY OF MARYLAND — POSSIBLE ADJUSTMENTS OF TUITION AND OTHER CHARGES

(Issued by the World Bank, August 16, 1976)

The University of Maryland has long differentiated between individuals who are "resident" (domiciled) in the State of Maryland and individuals who are "non-resident" in the state for purposes of admitting students and charging amounts for tuition and other fees. This is a policy common to most, perhaps all, public universities in the United States. At the University of Maryland, students who are determined to be residents of Maryland are referred to as having "in-state" status; others are in "out-of-state" status.

Beginning in 1974, the University limited eligibility for in-state status to students who are (or students whose spouse or parents are) United States citizens or who are admitted to the United States for permanent residence on immigrant visas. Three students who are G-iv visa holders or whose parents are G-iv visa holders commenced litigation against the University to contest the validity of these limitations. On July 13, 1976, the United States District Court for the District of Maryland decided that a rule which prevented G-iv visa holders from demonstrating that they were domiciled in Maryland was invalid by reason of the due process clause of the United States Constitution, and directed that the rule not be enforced.

The University has decided to appeal this decision to the United States Court of Appeals for the judicial circuit which includes Maryland. Because the appeal is not frivolous, the District Court, following procedures used frequently, has suspended enforcement of its own decision until the appeal is decided. This means that students who are classified as out-of-state by reason of G-iv status will continue to be treated as out-of-state unless and until the decision of the District Court is affirmed by the Court of Appeals.

However, if the decision of the District Court is affirmed, the University will refund the difference between the out-of-state and in-state tuition and other charges for all semesters beginning with the fall 1976 semester if the student would have been classified as in-state for those semesters under the District Court's decision and if the student applies to the Director of Admissions at the University for reclassification from out-of-state to in-state before the last day available for registration for the fall 1976 semester. On receipt of such application, the University will reply that the request will be held in abeyance pending the outcome of the appeal.

If you reside in the State of Maryland and if you or your spouse or child is classified as an out-of-state student by reason of G-iv visa status, the student should apply for reclassification to in-state status before the time indicated.

Staff members who, under the provisions of Personnel Manual Circular No. Pers/6/76 of April 26, 1976, are eligible for the Bank's tuition equalization subsidy with respect to the education of their dependent children at the University of Maryland must submit to the Personnel Department the following documentation in order to obtain the appropriate reimbursement from the Bank:

(a) Receipted bills for the tuition paid;

(b) Copies of the application to the Director of Admissions of the University for a reclassification from out-of-state to in-state status, and the Director of Admission's reply thereto; and

(c) Documentation from the University of Maryland listing the resident and non-resident tuition charges.

If the amounts reimbursed to the staff member by the Bank are ultimately refunded by the University, the staff member will, of course, be required to repay the Bank.

August 16, 1976

LETTER TO SUPREME COURT

February 28, 1979

Michael Rodak, Jr., Esquire
Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

Re: Wilson H. Elkins, President, University of Maryland v. Juan Carlos Moreno, et al., No. 77-154

Dear Mr. Rodak:

Mr. Justice Brennan delivered the opinion of the Court in the above-referenced case on April 19, 1978, Mr. Justice Rehnquist with whom the Chief Justice joined dissenting. In furtherance of the Court's opinion, Mr. Justice Brennan signed a separate order dated April 25, 1978, certifying a question of state law to the Court of Appeals of Maryland.

On June 23, 1978, the Board of Regents of the University of Maryland unanimously adopted a Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens. A certified copy of the resolution reaffirming the Board's policy was transmitted to you at that time for the Court's information, and a separate copy is enclosed with this letter for your convenience.

In an opinion filed on February 21, 1979, *sub nomine John S. Toll, President, University of Maryland v. Juan Carlos Moreno, et al.*, the Court of Appeals of Maryland answered the certified question; an informational copy of the opinion is enclosed with this letter, and we understand that the Clerk of the Court of Appeals of Maryland has sent one to Justice Brennan. Because Rule 850 of the Maryland Rules of Procedure allows a motion for reconsid-

eration to be filed within thirty days after the opinion has been filed, however, the official certified copy of the opinion of the Court of Appeals of Maryland provided for in Rule 896d, in lieu of the formal mandate normally issued under Rule 876, will not be forwarded to you until March 22, 1979, at which time the record also will be returned.

In light of the resolution unanimously adopted by the Board of Regents of the University of Maryland on June 23, 1978, and the opinion of the Court of Appeals of Maryland filed February 21, 1979, the petitioner has instructed this office to request that the case be restored to the Supreme Court's active docket for further briefing and argument at the earliest time deemed convenient and appropriate by the Court. Allowance of this request would provide the parties with the opportunity to make a focused presentation to the Court which we believe would be of genuine assistance to it in the resolution of the constitutional issues presented by this case in its present posture.

Please advise us when you are able to do so of the Court's disposition of the petitioner's request contained in this letter. Thank you for your assistance and cooperation in this regard.

Sincerely yours,

David H. Feldman
Assistant Attorney General
Chief of Litigation

LETTER TO SUPREME COURT

March 29, 1979

Michael Rodak, Jr., Esquire
Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

Re: Toll v. Moreno et al.
No. 77-154

Dear Mr. Rodak:

This is in response to your letter of March 24, 1979, in which you convey the Court's request that appellees respond to Mr. Feldman's letter to you dated February 28, 1979. In his letter, Mr. Feldman requests that "further briefing and argument" be allowed by the Court in this case.

It is the appellees' view that neither additional briefing nor further oral argument is necessary or appropriate in this case. Mr. Feldman's letter makes clear that the appellant wants such further briefing and argument to discuss a resolution adopted by the University of Maryland on July 23, 1978, subsequent to this Court's opinion in this case. A reading of that resolution will reveal that it is a *post hoc* attempt to avoid the impact of this Court's prior decision and to sidestep an adverse ruling by the Maryland Court of Appeals, and that it is irrelevant to this Court's resolution of this case. In its prior opinion, this Court stated that the "University has consistently maintained . . . that . . . its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland," 435 U.S. 647, 658-59; and it thus certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 aliens can be domiciled in Maryland under the Maryland common law, *id.* at 668. The University's new resolution, however, states that the University's policy adopted, for purposes of in-state tuition

and fees, its own, more restrictive definition of domicile, which does not depend on the definition of domicile under Maryland law and which precludes all nonimmigrant (including G-4) aliens from showing Maryland domicile, regardless of whether they can acquire Maryland domicile under the state common law.

Through this resolution, then, the appellant is seeking (as he vainly attempted to do in brief and oral argument in the Maryland Court of Appeals) to raise a new ground — one which he did not assert or argue in the trial court, in the United States Court of Appeals for the Fourth Circuit, or in this Court. This untimely claim or ground, therefore, is one which should not now be considered by this Court. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

The case remains in the identical posture in which it was when this Court certified to the Court of Appeals of Maryland the "potentially dispositive" question of whether there was anything in the Maryland law of domicile to preclude the holder of a G-4 visa from showing he was domiciled in Maryland. The Court of Appeals now has answered that question in the negative. Remaining for determination by the Supreme Court are only the issues of due process, as applied in *Vlandis v. Kline*, 412 U.S. 441 (1973) and equal protection, as applied in *Nyquist v. Mauclet*, 432 U.S. 1 (1977). These constitutional issues have been extensively briefed and, appellees believe, fully argued by the parties to the Court. No further briefs or oral arguments are required.

Respectfully submitted,

Alfred L. Scanlon
Attorney for Appellees.

LETTER TRANSMITTING PROPOSED ORDER

November 26, 1979

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for the
District of Maryland
Room 510, U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Moreno, *et al.* v. John S. Toll Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and one (1) copy of plaintiffs' proposed order to carry out your memorandum opinion of October 31, 1979 which dealt with the pre-June 23, 1978 aspects of this case.

A copy of this letter together with the proposed Order has been mailed to Mr. Feldman.

Sincerely yours,

Alfred L. Scanlan

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion filed on October 31, 1979, it is this day of , 1980, hereby ORDER, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, the paramount and controlling concern of the University of Maryland under its "In-state Policy" was with domicile in Maryland according to state law.

2. The Court of Appeals of Maryland having determined that G-4 visaholders may be domiciled in Maryland according to state law principles, plaintiffs and the class whom they represent are entitled to the benefits of in-state status prior to June 23, 1978, provided that such persons can show that they, or the person or persons upon whom they were financially dependent, were in fact domiciled in Maryland according to state law principles.

3. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visaholders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

4. At the request of any person who attended the University as a student during the period from the Spring term of 1974 through the Spring term of 1978 and who held a G-4 visa or was financially dependent upon a G-4 visaholder, the University of Maryland shall make the following determination: whether, for each term in which such student was enrolled at the University, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the state of Maryland according to state law principles for six consecutive months prior to the beginning of that term.

5. In making such determinations of domicile, the University shall apply the same standards, and apply them in the same way, as it does in determining whether a citizen or permanent resident alien is domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

6. After the University has determined in a particular case pursuant to paragraphs 4 and 5 of this Order that a student was entitled to in-state status, it shall refund to such person, with interest, the difference between the "out-of-state" tuition and charges actually paid to the University by such student and the lesser fees and charges which the student would have paid if he or she had enjoyed in-state status.

7. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

December 12, 1979

The Honorable James R. Miller
United States District Judge
United States Court House
101 West Lombard Street
Baltimore, Maryland 21202

Re: *Moreno, et al. v. Toll*
Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and two copies of the defendant's proposed order, to be issued at the conclusion of the entire case, to give effect to the memorandum of the Court filed October 31, 1979, that deals with the pre-June 23, 1978, aspects of this case. Because the defendant's proposed order differs significantly from the plaintiffs' proposal forwarded to the Court on November 26, 1979, an explanation might be helpful to the Court, and it follows.

The defendant does not believe that the language in numbered paragraphs one or two is either necessary or supported fully by the memorandum of the Court. The proposed orders both advert to the reasons stated in the memorandum of October 31, 1979, and that memorandum speaks for itself. For example, the memorandum discusses whether the "paramount" concern of the University under the Policy before June 23, 1978, was domicile, not whether domicile was the "paramount and controlling" concern as the plaintiffs now wish included in the first numbered paragraph of the order. In addition, the entitlement, if any, of certain persons to in-state status, referred to in the second numbered paragraph, flows from this Court's constitutional pronouncement, not from any decision of the Court of Appeals of Maryland. For these reasons, and because the inclusion of numbered paragraphs one and two is gratuitous and unnecessary to give effect to the memorandum, the defendant believes that these paragraphs should *not* be included in the order.

The defendant does not differ with the thrust of numbered paragraph three of the plaintiffs' proposed order; however, he suggests that the alternative language he proposes, which is modeled on numbered paragraph five of the order of July 13, 1976, is more faithful to the holding of the memorandum of October 31, 1979.

The defendant submits that numbered paragraphs four, five, and six of the plaintiffs' proposed order should *not* be included. First, he believes that all of the relief afforded by numbered paragraph six is barred by the Eleventh Amendment to the United States Constitution. Second, the granting of relief in numbered paragraph four to persons who were affected by the policy before July 13, 1976, the date of the original order of the Court, is the grossest form of retroactive monetary relief and goes far beyond both the order of July 13, 1976, and the terms of the order granting a stay of August 3, 1976. Finally, the defendant believes that the order should *not* contain the four and one-half lines of numbered paragraph five, purporting to disallow consideration in the in-state determination process of exemption "from state and local taxation on a salary of wages from an international organization by virtue of an international agreement to which the United States is a party." This language is *not* supported by either the original opinion of July 13, 1976, or the memorandum of October 31, 1979, and indeed is part of the new relief prayed for in paragraph (2)(b) on page three of the plaintiffs' proposed supplemental complaint, the appropriateness of which relief depends on a determination of the supremacy clause claim contained in the proposed supplemental complaint.

With the understanding that he does *not* thereby waive his ability to object to an award to the plaintiffs, the defendant accepts the language of numbered paragraph seven, and it is included in his proposed order.

In summary, the defendant urges that the proposed order of the plaintiff contains unnecessary, erroneous, and

gratuitous language and affords relief that is unsupported by the Constitution or the opinions of the Court. For these reasons, the defendant requests that the order to be issued by the Court at the conclusion of the case that will give effect to the memorandum of October 31, 1979, be in substance as contained in the proposed order attached to this letter.

The Court's consideration of the defendant's views as expressed in this letter is appreciated.

Respectfully yours,

DAVID H. FELDMAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum filed on October 31, 1979, it is this day of , 1980, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebutable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment; and

2. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

January 15, 1980

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for
the District of Maryland
Room 510, U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Moreno et al. v. John S. Toll, Civil Action No. M-75-691

Dear Judge Miller:

On November 26, 1979, we mailed to you a copy of plaintiffs' proposed order to carry out your memorandum opinion of October 31, 1979, which dealt with the pre-June 23, 1978, aspects of this case. Mr. Feldman, counsel for defendant, replied in a letter dated December 12, 1979, in which he objected to various portions of plaintiffs' proposed order. He attached, in addition, his own proposed order. At the same time, defendant served and filed defendant's answer to plaintiffs' proposed order. He attached, in addition, his own proposed order. At the same time, defendant served and filed defendant's answer to plaintiffs' motion for leave to file supplemental complaint and to add party plaintiff.

Consideration of these papers has led us to submit a revised proposed order, enclosed herewith, to clear up certain ambiguities that appear in the current definition of the class and clarify other aspects of the case — particularly, the Eleventh Amendment issues raised by Mr. Feldman. This revised proposed order supersedes the proposed order submitted on November 26, 1979.

In the first place, we believe that the class certified by the Court in its opinion and order of July 13, 1976, 420 F. Supp. 541, 564 (Record at 437), should be redefined pursuant to Fed. R. Civ. P. 23(c)(1), both to eliminate any

possible ambiguities stemming from the use of the present tense in that order and to reflect the division of the case into two parts — that dealing with the policy as it was in effect prior to June 23, 1978, and that dealing with the policy as it has been in effect since June 23, 1978. Accordingly, the revised proposed order, in ¶4, redefines the class represented by plaintiffs for the purpose of their challenge to the policy as it was in effect prior to June 23, 1978, and clarifies it. We anticipate proposing a similar redefinition and clarification of the class represented by plaintiffs for the purpose of their challenge to the policy as it has been in effect since January 23, 1978, as soon as the Court has ruled on that part of the case.

The remainder of the revisions to the proposed order are to clarify certain aspects of the case and, in particular, to clarify why Mr. Feldman's Eleventh Amendment objection to any back tuition relief is misplaced.[1] We do agree that Mr. Feldman is correct that no back tuition relief is appropriate as to the period prior to the Court's first order granting relief. The complaint was for "injunctive and declaratory relief only," 420 F. Supp. at 550 (Record at 407); that is, it sought only prospective relief. That relief was ordered by the Court on July 13, 1976, and that order, as subsequent proceedings have finally shown, was fully justified as to the period of time up to June 23, 1978. We propose that the Court's order make this point by reaffirming the July 13, 1976, order to that extent, and we have added language (¶ 3) to this effect. (Paragraph 5 then repeats the relevant language of the order and makes it

[1] Mr. Feldman objected to paragraphs 1 and 2 of the original proposed order on the ground that they were not supported by the Memorandum Opinion of October 31, 1979, and were "gratuitous and unnecessary." While we agree that the Memorandum Opinion "speaks for itself," we believe that inclusion of the points made in those paragraphs lends clarity to the order. To avoid any quibbles about precise wording, we have rewritten those two paragraphs; paragraph 1 of the revised proposed order contains language taken directly from the Memorandum Opinion at p. 20.

applicable to defendant Toll, the successor to President Elkins.)

While the July 13, 1976, order granted prospective relief only, and thus avoided any Eleventh Amendment issues of the kind raised by defendant, that order was stayed pending appeal. Order of August 3, 1976, Record at 459. A condition of the stay, however, was defendant's express representation, embodied in the stay order itself, that in the event the Court's Order of July 13, 1976, was "finally affirmed on appeal," the University would refund the relevant difference in tuition to "each student whose status is current determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester, would have been granted but for the stay." Without that agreement, which, at the very least, is an express waiver of any Eleventh Amendment immunity, the stay order would not have been granted. Paragraph 6 of the proposed order merely holds the University to this agreement and, together with paragraphs 8 and 9, provides for enforcement of that agreement.

We realize that defendant may take the position that the court's Order of July 13, 1976, has not yet been "finally affirmed on appeal," and so the stay will remain in effect until final disposition of the appeals that may follow the Court's orders after this round of decisions.We believe that such a position would be incorrect. The Court necessarily must issue an order after its reconsideration of the Order of July 13, 1976 — a reconsideration mandated by the Supreme Court. Even if that order, either in whole or in part, announces the Court's adherence to its original order, it is still the *latest* order which will be appealed to the Court of Appeals. While we expect the defendant to appeal the Court's order, at least as it concerns the pre-June 23, 1978 issues upon which defendant has already lost, we suggest that the merits of any stay pending appeal of that order, and the terms of a stay if one is granted, should be considered when the matter arises.

For the foregoing reasons, ¶ 6 of the proposed order has no Eleventh Amendment problems because it is based on defendant's express waiver of any such issues as a condition of the stay order of August 3, 1976.

Paragraphs 7 and 8 of the proposed order, which parallel paragraphs 4 and 5 of the original proposed order, merely clarify and make specific the procedures that the defendant is to follow in complying with ¶ 6. Mr. Feldman objects to the part of ¶ 8 (¶ 5 of the original proposed order) stating that the defendant "shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party." He claims that this clause "purport[s] to disallow consideration in the in-state determination process of [the international-organization employees' tax] exemption * * *." (P. 2.) He says that this language is not supported by either the original opinion of July 13, 1976, or the memorandum of October 31, 1979, and that it "indeed is part of the new relief prayed for in * * * the plaintiffs' proposed supplemental complaint * * *." (*Id.*)

Mr. Feldman's objection appears to reflect a misunderstanding of the words in question. The sole purpose of the disputed clause is to make clear what is indicated in the preceding clause — *i.e.*, that the defendant shall apply to the plaintiffs the usual state law standards for domicile. This Court has already decided that domicile under state law principles was the controlling concern of the University prior to the June 23, 1978, Clarifying Resolution. Accordingly, domicile under such principles is the only relevant consideration for in-state status for that period. See Memorandum Opinion of October 31, 1979, pp. 18-20. The language in question merely prohibits the defendant from holding that a class member is not domiciled in Maryland *solely because* he or she either held a G-4 visa or "was exempt from state and local income taxation on a

salary or wages from an international organization by virtue of an international agreement to which the United States is a party." This prohibition reflects the holding of the Court of Appeals of maryland in *Toll v. Moreno*, 397 A.3d 1009, 1018 (1979), where the Court held that nothing inherent in the nature of a G-4 visa, nor the tax-exempt nature of the salaries that such visaholders receive from international organizations, renders such visaholders "absolutely incapable of establishing a Maryland domicile." Accordingly, we do not believe that Mr. Feldman has any ground for objecting to the language as a limitation on the circumstances under which defendant can hold a class member not domiciled in Maryland.

Nor is it correct to say, as Mr. Feldman does, that the language in question "is part of the new relief prayed for" in the proposed supplemental complaint. As shown above, the clause in question relates directly to the determination of domicile under state law principles, which is clearly part of the pre-June 23, 1978, aspects of this case,not any "new relief." Indeed, as to the period after June 23, 1978, this Court has held that "the University is no longer concerned with the Maryland law of domicile, but rather with its own more limited use of that term." Memorandum Opinion of October 31, 1979, at p. 18. The success or failure of that argument has no bearing on the order proposed for the period before June 23, 1978.[2]

[2] To the extent Mr. Feldman means to argue that the University may still be permitted, *apart from the question of domicile*, to deny in-state status to the plaintiffs under the pre-June 23, 1978, policy on the ground of their G-4 status or tax exemption, that contention must fail. The Court's decision that domicile under Maryland law was the controlling concern of the University prior to June 23, 1978, precludes defendant from denying in-state status to class members on any ground other than non-domicile, and the revised proposed order, in paragraph 7, correctly reflects that decision.

For all of these reasons, the revised proposed order enclosed with this letter should be entered by the Court on the issues relating to the period prior to June 23, 1978.

Respectfully submitted,

Alfred L. Scanlan

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion filed on October 31, 1979, it is this day of , 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its "In-State Policy" hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the State.

2. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visa-holders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

3. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

4. The class represented by the named plaintiffs for the purpose of their challenge to the In-State Policy prior to June 23, 1978, is redefined, pursuant to Fed. R. Civ. P. 23(c)(1), as the following subclass: All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, have resided in Maryland

and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy," as it was in effect prior to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were entitled to "in-state" status for purposes of tuition and charge differential determinations.

6. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the Spring semester of 1978, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

7. For purposes of paragraph 6 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles or six consecutive months prior to the beginning of that semester.

8. In making the determinations of domicile required by paragraph 7 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien is domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

9. The Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

AFFIDAVIT OF WAYNE SIGLER
(Filed January 28, 1980)

STATE OF MARYLAND,
COUNTY OF PRINCE GEORGE'S, TO WIT:

I, WAYNE SIGLER, being duly sworn, depose and say as follows:

1. I am Director of Undergraduate Admissions for the University of Maryland, College Park. I have served continuously in this position since January, 1977.

2. In this supervisory capacity, I exercise overall administrative responsibilities relative to the admission of undergraduate students to the College Park campus of the University, including processing the admission of foreign students and administering the University's policy with respect to tuition and fee differentials charged in-state and out-of-state undergraduate students. In addition, at my request, statistics regarding foreign student population at the principal undergraduate campuses of the University of Maryland (College Park, Baltimore County, and Eastern Shore) have been compiled from the official records of the University of Maryland.

3. In the fall of 1978, these statistics reflect that 493 students with nonimmigrant visas registered as undergraduate students at the College Park, Baltimore County, and Eastern Shore campuses of the University of Maryland, while 997 immigrant students were registered. These students, by campus and visa category, are as follows:

	CAMPUS		
	Balto. Co.	*College Park*	*Eastern Shore*
A-Visa	—	52	—
F-Visa	30	201	35
G-IV Visa	—	68	—
J-Visa	2	5	—

Other non-immigrants	—	100	—
Immigrants/ Permanent Residents	167	830	—

4. In the fall of 1979, these statistics reflect that 554 students with nonimmigrant visas registered as undergraduate students at the College Park, Baltimore County and Eastern Shore campuses of the University of Maryland, while 1255 immigrant students were registered. These students by campus and visa category are as follows:

	CAMPUS		
	Balto. Co.	*College Park*	*Eastern Shore*
A-Visa	1	72	—
F-Visa	25	273	30
G-IV Visa	—	72	—
J-Visa	1	8	—
Other non-immigrants	—	72	—
Immigrants/ Permanent Residents	216	1034	5

5. Those students listed as immigrant/permanent resident aliens in paragraphs 3 and 4 above are not prevented from qualifying for in-state tuition and fee differentials and many of them are classified as in-state students. For example, for the fall of 1979, at least 985 immigrants/ permanent resident aliens at the College Park Campus received an in-state classification.

6. Because of my role in administering the University's in-state policy and my service on the Intercampus Review Committee which considers appeals for students seeking in-state classification, I am well acquainted with the features of the University's policy (which, insofar as it

denies in-state status to nonimmigrants, is identical to that of the overwhelming majority of other public colleges and universities in the United States) and also its administrative costs, in terms of staff time and expense.

7. Presently, 17 members of my staff devote a substantial portion of their time administering the in-state determination and appeals process, and handling the average of 700 petitions for in-state classification filed each year by undergraduates at the University's College Park Campus. Although it is difficult to calculate with precision the actual total annual cost of administering the in-state determination and appeals process for all campuses of the University, I estimate, based on the most recent data available that it may exceed $100,000 annually if staff time of the Admissions Office, Chancellor's Office, and the President's Office, and the Attorney General's Office are included, as well as costs for supplies and other overhead expenses, including pro-rata costs for buildings use and utilities. Of greater incalculable cost to the University is the loss of countless hours required to administer the in-state process by Admissions Office personnel who should be spending their time visiting high schools, responding to prospective students' inquiries, and recruiting the very best students to attend the University.

8. Presently, in-state classification hearings for non-immigrant aliens, where requested, are generally limited to the "objective" criterion of determining whether their non-immigrant status has been adjusted. However, based upon my more than eight years experience on the University admissions staff, I am convinced that measurably more staff time and expense would be involved if full-scale individualized hearings on purported domiciliary indicia were afforded non-immigrant aliens. Affording non-immigrant students full-scale hearings would, in my view, likely render the process more protracted, complicated, and consequently more administratively burdensome to the University.

I hearby affirm, attest, and confirm that I am over 21 years of age, competent to testify, and except as otherwise indicated herein, have personal knowledge of the foregoing statements.

WAYNE SIGLER

SUPPLEMENTAL COMPLAINT

(Filed February 4, 1980)

1. Plaintiffs incorporate by reference and reallege the allegations of paragraphs 1 through 30 of their Verified Complaint filed on May 27, 1975, and designate those paragraphs as Count I.

Count II

2. Plaintiff Rene Otero, Jr., is a native of Bolivia. He is the younger brother of plaintiff Juan Pablo Otero, is twenty-three years old, and has resided with his family in Maryland for fourteen years. He holds a G-4 visa. He is domiciled in the State of Maryland.

3. Rene Otero, Jr., is currently a full-time student at the University of Maryland. He has attended the University as a full-time student since the fall of 1976.

4. On June 23, 1978, the Board of Regents of the University of Maryland adopted "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admissions, Tuition, and Charge Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." This Resolution purports to be a "reaffirmation" of the Board of Regents' in-state policy adopted on September 21, 1973. That policy, as applied under the Resolution subsequent to June 23, 1978, bars all nonimmigrant aliens, including the plaintiffs and the class whom they represent, from establishing in-state status at the University of Maryland, "regardless of whether or not

the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law."

5. The Resolution of June 23, 1978, however, effects no change in the standards governing determinations of in-state status of United States citizens or aliens holding immigrant visas, as those standards are described in paragraph 12 of plaintiffs' Verified Complaint.

6. In consequence of the Board of Regents' policy for the determination of in-state status, both as initially adopted on September 21, 1973, and as applied since June 23, 1978, plaintiff Rene Otero, Jr., has been denied in-state status, and thus has paid, and continues to pay, the charges applicable to out-of-state students at the University of Maryland. By so denying Rene Otero, Jr., in-state status, defendant has violated and is violating his rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 of plaintiffs' Verified Complaint, as well as the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.

WHEREFORE plaintiffs pray that this Court, in addition to awarding the relief prayed for in the Verified Complaint filed on May 27, 1975:

(1) adjudge and declare that the actions of the defendant in denying to plaintiffs in-state status for admission, tuition, and charge-differential purposes on the basis of the University's September 21, 1973, policy as applied under the Board of Regents' June 23, 1978, Resolution are unlawful;

(2) enjoin the defendant from enforcing the University's September 21, 1973, policy as applied under the Board of Regents' June 23, 1978, Resolution by denying to any student in-state status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent: (a) is the holder of a

G-4 visa, or (b) pays no Maryland state income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party.

Dated: November 16, 1979

Signatures omitted

ANSWER TO SUPPLEMENTAL COMPLAINT

(Filed February 21, 1980)

Defendant, John S. Toll, President of the University of Maryland, by his attorneys, Stephen H. Sachs, Attorney General, David H. Feldman, Assistant Attorney General, and Robert A. Zarnoch, Assistant Attorney General, in answer to the Supplemental Complaint filed herein state:

1. In response to paragraph 1 of the Supplemental Complaint, Defendant incorporates by reference and realleges the defenses and allegations of paragraphs 1 through 30 of the Answer to Plaintiffs' Verified Complaint filed on June 25, 1975.

2. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr., to intervene, Defendant feels that no response is necessary to paragraph 2 of the Supplemental Complaint, but to the extent an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Supplemental Complaint.

3. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr. to intervene, Defendant feels that no response is necessary to paragraph 3 of the Supplemental Complaint, but to the extent an answer is required. Defendant admits the allegations contained in paragraph 3 of the Supplemental Complaint, except that Rene Otero, Jr. has been a full-time student at the University of Maryland since the fall of 1975.

4. Defendant admits the allegations contained in paragraph 4 of the Supplemental Complaint.

5. Defendant admits the allegations contained in paragraph 5 of the Supplemental Complaint.

6. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr. to intervene, Defendant feels that no response is necessary to paragraph

6 of the Supplemental Complaint, but to the extent that an answer is required, Defendant admits the allegations contained in the first sentence of paragraph 6 but denies the allegations contained in the second sentence of paragraph 6 of the Supplemental Complaint.

WHEREFORE, Defendant respectfully prays that:

(1) The relief requested in the Verified Complaint and the Supplemental Complaint be denied.

(2) All cost of these proceedings be assessed against Plaintiffs.

Signatures omitted

In The United States District Court
for the District of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

vs.

John S. Toll,
President, University of Maryland

MEMORANDUM AND ORDER

(Filed April 11, 1980)

As stated in open court in a hearing held on March 27, 1980, the court finds it appropriate to reconsider its prior ruling (Paper 37) on the plaintiffs' motion to add a party plaintiff, Renee Otero, Jr. (Paper 29).

It is therefore ORDERED this 11th day of April, 1980, by the United States District Court for the District of Maryland, that the plaintiffs' motion for leave to add a party plaintiff is hereby GRANTED, and Renee Otero, Jr. is hereafter a party plaintiff in the present action.

JAMES R. MILLER, JR.,
United States District Judge.

LETTER TRANSMITTING PROPOSED ORDER

April 28, 1980

The Honorable James R. Miller, Jr.
United States District Judge
U.S. District Court for the
District of Maryland
U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Juan Carlos Moreno, *et al.* v. John S. Toll Civil Action No. M-75-691

Dear Judge Miller:

At the close of oral argument in this case on March 28, 1980, you stated that the parties and the Court probably would have one more session regarding the final order to be issued in this case. To that end, we have prepared a proposed order to implement Your Honor's memorandum opinions of October 31, 1979 and April 17, 1980. This proposed order takes the place of the order we submitted to Your Honor under cover of January 15, 1980 and the letter accompanying that order and explaining the provisions still applies to most of this order.

We await the Court's convenience in scheduling any conference that it may think is required concerning the order.

As indicated, a copy of this letter and proposed order have been sent to Mr. Feldman.

Sincerely yours,

ALFRED L. SCANLAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion of October 31, 1979, 480 F. Supp. 1116, and the

Court's memorandum opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its In-State Policy hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the law of the state.

2. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visaholders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

3. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

4. The University of Maryland's In-State Policy, as enforced since June 23, 1978, pursuant to the Board of Regents' "Clarifying Resolution" of June 23, 1978, to flatly deny to all G-4 visa-holders the opportunity to prove that they were domiciled in Maryland according to state law principles, has been and is now unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the U.S. Constitution.

5. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the memorandum opinion of April 17, 1980, and paragraph 4 of this order.

6. The class represented by the named plaintiffs, which was initially defined at 420 F. Supp. 541, 564, and subdivided to include the following subclass by this Court's order of April 17, 1980:

> "All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa,"

is hereby further subdivided to include the following subclass within the originally defined class:

> "All persons who, beginning June 23, 1978, and during any period of time thereafter, have resided in Maryland and attended the University of Maryland, and who have held or have been named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or have been financially dependent upon a person holding or named within such a visa."

7. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's In-State Policy, as it was in effect prior to June 23, 1978, or has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to in-state status for purposes of tuition and charge differential determinations.

8. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on

August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

9. For purposes of paragraph 8 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester.

10. In making the determinations of domicile required by paragraph 9 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

11. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

May 19, 1980

The Honorable James R. Miller, Jr.
United States District Judge
510 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: *Moreno, et al. v. Toll,* Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and two copies of an order that the defendant urges is in appropriate form to give effect to this Court's opinions of October 31, 1979, and April 17, 1980.

For the reasons suggested in the letter to the Court written on the defendant's behalf, dated December 12, 1979, as amplified in this letter, the defendant believes that the most recently submitted order of the plaintiffs, sent April 28, 1980, violates the letter and the spirit of the Eleventh Amendment and should not be entered. The defendant's specific objections follow.

The defendant does not believe paragraph 1 of the plaintiffs' order is appropriate. As suggested in the defendant's December 12, 1979 letter, commenting on an earlier version of paragraph 1, the defendant believes it to be "gratuitous and unnecessary." In any event, the new paragraph 1 raises a number of problems. First, paragraph 1 is merely an out-of-context and thus misleading excerpt from page 20 of the Court's opinion of October 31, 1979; for example, the second clause suggests that the plaintiff "were entitled to the benefits" when the obvious thrust of the Court's opinion is that they "should have been." In addition, the language of this clause, by using the open-ended "prior to June 23, 1978," merely highlights the Eleventh Amendment problems the plaintiffs claim they seek to avoid. These two examples merely serve to

highlight the dangers of mixing opinion with order and counsel the deletion of this surplus paragraph.

The plaintiffs' paragraph 2, previously numbered paragraph 3 in their draft of November 26, 1979, remains unchanged, and should be rejected in favor of the defendant's alternative, for the reasons set forth in the first full paragraph of page two in the defendant's letter to the Court of December 12, 1979.

The defendant also objects to, and urges deletion of, the plaintiffs' new paragraph 3. It is a transparent effort to do an end-run around the proscription of the Eleventh Amendment to the United States Constitution. As discussed in the Memorandum of the Defendant, dated July 30, 1979, the Court's order of July 13, 1976, has been vacated and may not, at this late date, properly be resuscitated. It certainly was not and now never can be "finally affirmed on appeal," as required by the order of August 3, 1976.

The plaintiffs' new paragraph 4, which seeks to give effect to the Court's opinion of April 17, 1980, suffers the same problems as paragraph 2, and thus the defendant urges that his alternative language, included in the enclosed order, be accepted.

As paragraph 5 of the plaintiffs' order merely reiterates and enlarges on paragraph 3, it should be rejected on the same basis as that paragraph.

The plaintiffs have not sought to explain the further class subdivision included in paragraph 6 of their order and, absent explanation, the defendant believes this paragraph not to be appropriate. In any event, this is the sort of matter that the defendant urges would better be handled, if appropriate at all, by separate order.

The defendant also urges that paragraphs 7, 8, 9, and 10 are barred by the Eleventh Amendment to the United States Constitution. In this regard, the defendant's letter of December 29, 1979, adequately poses the problem in its comments on paragraphs 4, 5, and 6 of the earlier

proposal, and they need not be repeated here. Suffice it to say, by example, that paragraph 7 of the current order continues to suggest by its "prior to June 23, 1978," language, unlimited retroactive relief. Similarly, the defendant continues to except to the language found in paragraph 10 (paragraph 5 in the plaintiffs' proposed order of November 26, 1979) that purports to exclude any consideration of G-4 visa status or of nonpayment of state and local income taxes. Nothing in the Court's opinions suggests that retention of G-4 visa status or nonpayment of state and local income taxes could not be objective factors to be considered in making the subjective determination of domiciliary intent.

With the same caveat contained in his letter of December 12, 1979, the defendant accepts the language of paragraph 11 (paragraph 7 in the plaintiffs' draft of November 26, 1979), and it is included in his proposed order.

Because the plaintiffs have made no effort to distinguish their proposed order from the host of authority giving effect to the Eleventh Amendment's prohibition against retroactive monetary relief, the defendant has not undertaken to brief the obvious. However, if the plaintiffs do file a memorandum on this issue or if the Court has concerns in this respect, the defendant would like an opportunity to respond.

In summary, the defendant urges that the order enclosed with this letter — *not* the order contained in the plaintiffs' letter of April 28, 1980 — is appropriate to give effect to this Court's opinions of October 31, 1979, and April 17, 1980. For this reason, the defendant requests, subject to his obvious differences as to substance, that his proposed order be signed in the form he has submitted.

Thank you for the Court's consideration.

Respectfully yours,

DAVID H. FELDMAN,
Assistant Attorney General.

PROPOSED ORDER

For the reasons stated in the Court's memoranda filed on October 31, 1979, and April 17, 1980, it is this day of , 1980, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebutable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That before, on, and after June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens the opportunity to establish "in-state" status, was and is unconstitutional as it was and is in violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause;

3. That an order granting prospective injunctive relief will be entered if the defendant does not act in accordance with the declarations set forth in this order after the expiration of the time for appeal or, if an appeal is filed, after this order is finally affirmed on appeal; and

4. That the Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

May 28, 1980

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for
the District of Maryland
Room 510, U. S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: *Juan Carlos Moreno et al. v. John S. Toll, Civil Action No. M-75-691*

Dear Judge Miller:

On April 28, 1980, we sent to you a proposed order in this case, intended to reflect your rulings of October 31, 1979, on the irrebuttable-presumption issue in this case, and of April 17, 1980, on the remaining issues. The proposed order was a substitute for the proposed order we had sent you on January 15, 1980 (on the first part of the case), but we said that the letter of January 15th still explained most of the provisions of the new proposed order.

Mr. Feldman, counsel for defendant, has replied to our proposed order on April 28th in a letter dated May 19, 1980, and has submitted defendant's latest proposed order. Indeed, he has done more. Though his letter of May 19th does not mention the fact, his proposed order incorporates a stay of any injunctive relief pending appeal. We had drafted each of our orders in the form of an order granting complete relief that would go into effect immediately, and did not discuss the form of any stay pending appeal. We did this simply because the matter of a stay pending appeal seemed to us a separate matter that should be addressed once the underlying order had been settled. In fact, we continue to believe that the matter of whether the order ultimately issued by this Court should be stayed pending appeal is best deferred. Mr. Feldman will have 10 days after the order is entered in which to move for stay

pending appeal, Rule 62(a), (c), Fed. R. Civ. P.; alternatively, he can file a motion in advance of entry of the order. There appears to be no reason for us to attempt to anticipate his arguments on a stay, particularly when the parties are in such severe disagreement over the underlying order, but we shall address, at the end of this letter, certain issues pertaining to a further stay. We turn first, however, to the question of the proper form of an order on the merits.

Defendant's critical objection to plaintiffs' proposed order is based on the Eleventh Amendment. Defendant objects to all the portions of plaintiffs' proposed order that require defendant to refund to members of plaintiffs' class the difference between out-of-state and in-state tuition from the Fall semester of 1976 to the date of the entry of the order under consideration. In short, defendant's position is that while *prospective* injunctive relief is appropriate (though he seeks to avoid the entry of that relief until all appeals are exhausted, see his proposed order, ¶ 3), he cannot, by reason of the Eleventh Amendment, be required to pay back any money unlawfully collected after the date of this Court's initial order of July 13, 1976, 420 F. Supp. 541. This position is absolutely indefensible, as we shall demonstrate below.[1]

---

[1] Defendant's objections to paragraphs 1 through 5 of our proposed order seem to us largely misplaced. Apart from the Eleventh Amendment objection, discussed in the rest of this letter, there seems little difference between the parties. Mr. Feldman states that ¶ 1 "highlights" the Eleventh Amendment problem, while we believe it has little to do with the matter of monetary relief. This Court has held that the In-State Policy was unlawful before June 23, 1978, on irrebutable-presumption grounds; accordingly, plaintiffs and their class "were entitled" at that time to the benefits of in-state status, as the paragraph states.

Apart from that, we have no objection to ¶¶ 1 and 2 of defendant's proposed order being substituted for ¶¶ 2 and 4 of plaintiffs' proposed order of April 28th, and we attach a proposed order that makes that correction to our proposal.

This Court's opinion and order of July 13, 1976, 420 F. Supp. 541, declared that the University's "In-State Policy," was unconstitutional in its effect on G-4 visaholders, and enjoined the enforcement of that policy "with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differentials." 420 F. Supp. at 565. Accordingly, if this order had not been stayed pending appeal, from the Fall semester of 1976 to date, the members of the plaintiffs' class would have been treated on the same terms as citizens and resident aliens, and, if they could establish that they were domiciled in Maryland, would have paid the lower in-state tuition ever since.

On August 3, 1976, this Court stayed the effectiveness of the July 13th order. That stay order was granted after a motion by defendant, in which he represented specifically that "plaintiffs will not suffer substantial harm if a stay is granted," Motion to Stay Order Pending Appeal (July 31, 1976), at 1, and after an oral hearing on August 2, 1976, at which counsel for defendant made certain representations that are summarized in the stay order.

That stay order reads, in pertinent part,

> "[T]he Court having heard oral argument of counsel for the respective parties in open court on August 2, 1976, at which time it was represented by counsel for Defendant Elkins [Mr. Feldman] that were a stay granted (1) the University of Maryland, for the fall 1976 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester, would have been granted but for the stay, would refund the difference in tuition and other charges between the 'out-of-state' charges assessed and actually paid and the 'in-state' charges that would have been assessed, in the event the

Court's Order of July 13, 1976, were finally affirmed on appeal * * *;

"And the Court having determined from the foregoing pleadings and arguments that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

"IT IS * * *

"ORDERED, That the Motion to Stay Order Pending Appeal be granted as prayed and that the effectiveness of paragraphs (5) and (6) of the Court's Order contained in its Opinion and Order filed July 13, 1976, be, and the same hereby is, STAYED."

The intent of the parties and of the Court is clear on the face of this order. While defendant took his appeal, the University would not have to pay back the tuition differentials that might prove to be owing to members of the plaintiff class; if, however, the appeal was not successful, defendant would have to make the plaintiffs whole, back through the Fall semester of 1976 (the first full semester after the prospective order of July 13, 1976). If that had not been the obvious intent of the stay order, it is unlikely in the extreme that this Court would have found that the prerequisites of *Long v. Robinson* were met. Nor could defendants have represented that "plaintiffs will not suffer substantial harm if a stay is granted."

As a result of defendant's appeal from the order of July 13, 1976, the Court of Appeals for the Fourth Circuit entered a per curiam order of affirmance, 566 F.2d 573 (Apr. 28, 1977); the Supreme Court certified a question of the Maryland law of domicile to the Maryland Court of Appeals, 435 U.S. 647 (Apr. 19, 1978); that court rejected defendant's contention on domicile as a matter of Maryland law, 284 Md. 425, 397 A.2d 1009 (Feb. 21, 1979); and the Supreme Court, in light of an intervening development that reflected a change in defendant's contentions, vacated the judgment of the Court of Appeals and directed that the case be remanded to this Court for reconsideration. 441

U.S. 458 (Apr. 30, 1979). In further proceedings in this Court, it has been determined that the 1976 order enjoining the application of the In-State policy against G-4 visaholders was entirely correct — for the same reason as that given in 1976 for the period up to June 23, 1978, and for different reasons (based on the Equal Protection and Supremacy Clauses), though ones that were fully briefed and argued throughout the case, for the entire period from July 13, 1976 to date.

In short, in not one court has defendant prevailed on the merits. It lost in 1976, and not one appellate court — including the Supreme Court — has said that the 1976 order was erroneous. It is incredible, under the circumstances, that defendant could advance the position that it should not now, and cannot ever be, ordered to pay the money it promised to refund, if necessary, in 1976. The upshot of defendant's argument is that he has won the entire case to date, since he claims he can never be required to pay back monies unlawfully collected after the date of the order of July 13, 1976 — an order never reversed by any court and now determined to have been correct.

Since we assume that defendant intends to appeal this Court's latest ruling, it is important to emphasize that the question is not whether defendant should be ordered to pay the money due since 1976 immediately, as opposed to after its intended appeal is exhausted. Defendant contends instead that he can *never* be ordered to pay refunds for the period 1976 to date. Its position is as follows:

> "[T]he Court's order of July 13, 1976, has been vacated and may not, at this late date, properly be resuscitated. It certainly was not and now nevercan be 'finally affirmed on appeal,' as required by the order of August 3, 1976." Letter of May 19, 1980, at 2.

As a matter of fact, this Court's order of July 13, 1976, has never been vacated. The order was stayed, by this Court, pending appeal. The Court of Appeals affirmed the

order. 566 F.2d 573. The Supreme Court, after determination of the certified question by the Maryland Court of Appeals, stated:

> "The Clarifying Resolution[of June 23, 1978] thus raises new issues of constitutional law which should be addressedin the first instance by the District Court. *We therefore vacate the judgment of the Court of Appeals* and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (emphasis added).

In short, it was the order of affirmance of the Court of Appeal that was vacated, not the order of this Court.

If the Supreme Court's order is interpreted as "vacating" the order of July 13, 1976, in the manner suggested by the defendant, then plaintiffs have suffered a grave miscarriage of justice. They sought the relief that was granted on July 13, 1976, on several grounds: (a) that the University's policy created an irrebuttable presumption in violation of the Due Process Clause, the ground accepted by this Court; (b) that the policy denied plaintiffs equal protection of the laws, a ground not ruled on by this Court in 1976, but approved in the memorandum of April 17, 1980; and (c) that the policy violated the Supremacy Clause, a ground also not ruled on by this Court in 1976, but approved in the memorandum of April 17, 1980. If the Supreme Court had intended to rule that the order of July 13, 1976, was improperly entered, it would have had to address the contentions that this Court had not ruled on. Those issues were fully briefed in the Supreme Court. Nevertheless, the Supreme Court did not say anything about them. We think it is obvious that the Supreme Court believed that the issue that defendant had presented to it — the irrebuttable-presumptions issue — might no longer be the dispositive ground of the order of July 13, 1976, given that defendant was arguing that the Clari-

fying Resolution of June 23, 1978, avoided the irrebuttable-presumption issue. Since that issue had not been addressed by the District Court, the Supreme Court remanded the case so it would be addressed. The case is thus in the same posture as if this court had agreed to entertain a timely Rule 60 motion for relief from its judgment.

In any event, we believe that defendant's position has already been rejected by this Court. In its principal memorandum on the irrebuttable presumption issue, Memorandum of Defendant dated July 30, 1979 (hereinafter "Def. Memo. (7/30/79)"), defendant argued at length that the Court was not free to "reembrace" the doctrine of irrebuttable presumptions, in part because "the effect of the Supreme Court's action in vacating the fourth Circuit judgment and remanding to this court is to vacate the July 13, 1976, judgment of this court." Def. Memo. (7/30/79) at 12-13. And in arguing that the June 23, 1978, Clarifying Resolution "did not retroactively impair a vested right to which the plaintiffs were entitled," defendant argued in a footnote:

> "The possibility of tuition refunds contained in the order of August 3, 1976, hinged, among other things, upon the order of July 13, 1976, being 'finally affirmed on appeal.' It is beyond argument that this condition was not fulfilled." Def. Memo. (7/30/79) at 15 n. 13.

Had this Court accepted defendant's arguments, a large portion of its Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116, would have been entirely unnecessary. While that opinion declined to accept the applicability of the irrebuttable-presumption doctrine for the In-State Policy after June 23, 1978, slip op. at 20-21, 480 F. Supp. at 1125-26, it reaffirmed the illegality of the In-State Policy prior to June 23, 1978, on the basis of the irrebuttable-presumption doctrine. Slip op. at 13-20, 480 F. Supp. at 1122-25. Had the Court accepted defendant's

argument, there would have been no point on ruling on the Policy prior to June 23, 1978, for a prospective injunction could not have been entered in 1979 or 1980 relating to the period prior to June 23, 1978 (unless that injunction ordered defendant to pay back monies unlawfully collected during that period — a remedy defendant is saying is inappropriate). Questions relating to the period of time prior to June 23, 1978, still presented a live controversy solely because of the stay pending appeal and the conditions upon which it was entered. Dealing specifically with defendant's argument that the stay order had become irrelevant, the Court said:

> "The ruling by this court was filed on July 13, 1976, granting injunctive relief to the plaintiffs. That order was stayed, however, pending final outcome on appeal on condition that, should the plaintiffs ultimately prevail, the University would refund to them the difference between in-state and out-of-state charges paid. [Footnote omitted.]
>
> "The defendants maintain that the plaintiffs' rights have not been adversely affected by the University's change in position and that giving the 'clarifying' resolution retroactive effect will not impair the plaintiffs' rights. Defendants base this contention on their perception that the order staying this court's initial injunction order made the plaintiffs' eventual right to any monetary recovery contingent upon a final decision in their favor. Since no final ruling has been entered for the plaintiffs, *the defendants claim the plaintiffs have no right to any compensation* and will not be prejudiced if the University's regulation is given retroactive effect.
>
> "*The court is not persuaded by the defendants' argument on this point.* * * *" Slip op. at 18-19, 480 F. Supp. 1124-25 (emphasis added).

Thus this Court has squarely rejected defendant's contention that it cannot be ordered to pay the refunds agreed to in the stay order of August 3, 1976, and that ruling, besides being entirely correct, is the law of the case.

For all these reasons, there is no Eleventh Amendment problem in this case because of the conditions imposed on the stay order of August 3, 1976. Plaintiffs' proposed order properly directs defendant to begin processing members of plaintiffs' class and to make refunds to those members of the class who were domiciled at the relevant times.

Another matter raised by defendant Toll concerning the proposed order on the merits requires a response. He objects to ¶ 10 of plaintiffs' proposed order on the ground that it "purports to exclude any consideration of G-4 visa status or of nonpayment of state and local income taxes." Defendant argues that "[n]othing in the Court's opinions suggests that retention of G-4 visa status or of nonpayment of state and local income taxes could not be objective factors to be considered in making the subjective determination of domiciliary intent." Letter of May 19, 1980, at 2-3. A determination on "domicile" is typically made on the basis of "all the circumstances." To the extent that this is a test for citizens and resident aliens, plaintiffs do not object to the same test being applied to G-4 visaholders. This, indeed, is the point of the first clause of ¶ 10. The danger that we see, however, is that the decision-maker might let G-4 visa status or exemption from state and local income taxation under the treaties be determinative factors in the decision. This result, of course, would merely achieve by indirection what the court has ruled unlawful. Obviously the decision-maker can take into account that these class members are aliens who may have roots in other countries; indeed, the decision-maker will have to take into account some aspects of a G-4 visa to avoid placing undue weight on the fact that a G-4 visaholder has not sought to become a "resident alien." We believe that our proposed wording captures the intended meaning that holding a G-4 visa and being exempt from taxation under the treaties not be determinative factors in the determination of domicile.

* * * * * *

Having dealt with Mr. Feldman's objections to the proposed order on the merits, we feel it may be helpful at this time to say something about the separate matter that he raises: Whether this order of the Court should be stayed pending the appeal that we expect defendant will take.

Our position is that the stay pending appeal entered on August 3, 1976, expires with the entry of the Court's order that is now under consideration. The stay of August 3, 1976, was intended to remain in effect during the pendency of defendant's appeal, and it makes sense to construe it as remaining in effect during the pendency of any further proceedings that are directed as a result of that appeal — that is, during the proceedings before this Court on the remand ordered by the Supreme Court. In other words, our position is that the order of July 13, 1976, will be "finally affirmed on appeal" within the meaning of the stay order when this Court enters its new order. This Court has already concluded that the order of July 13, 1976, was proper and required by law, though in part for reasons different from those originally set forth. But that change of ground does not alter the fact that the Court made the determination that an injunction against the University's "In-State Policy" was proper in 1976 because the policy was unlawful and, upon consideration of the effect of the June 23, 1978, Clarifying Resolution (which offered additional justifications for the In-State Policy but did not modify it by its terms), has made the determination that the Policy was unlawful at all times after July 13, 1976. No further proceedings were directed by the Supreme Court. Thus, the result of defendant's appeal has been a determination that the original decision to enjoin the Policy was correct. Neither the Supreme Court nor the Court of Appeals retained jurisdiction of defendant's appeal. Accordingly, that appeal is now over, and defendant should be ordered to comply with the condition in the stay order.

If the Court issues such an order, defendant has indicated that he desires a stay pending appeal from the

new order. We would like the opportunity to respond fully to a motion for such a stay on the merits. We feel it is appropriate, however, to raise one of our concerns at this time, a concern that relates to the harm resulting to members of the plaintiff class from the passage of time. We do so without prejudice to further arguments that we may have relating to a stay pending appeal.

It is now four years from this Court's initial determination that the University was unlawfully denying G-4 visaholders, and students dependent on G-4 visaholders, the opportunity to show that they were domiciled in Maryland at the time that they attended school. The more time passes, the more of these students will graduate and perhaps move away. More important, the problems of proving domicile several years ago become enormous, since the issue is a subjective one. If the order proposed by plaintiffs goes into effect immediately, defendant will begin processing on the proper standard the long-outstanding requests for classification to in-state status. If it does not go into effect, that subjective determination will be delayed again, perhaps for several years. If a further stay pending appeal were to be granted in this case, plaintiffs would strenuously urge that, at the very least, defendant be ordered to make the determinations required under ¶¶ 9 and 10 of plaintiffs' proposed order, even if the money is not paid out pending further appeal. Any other provision would be severely and unnecessarily prejudicial to the members of plaintiffs' class.

If the Court rejects our position that its impending order will mean that the original order of August 3, 1976, then it follows that the appeal process must be deemed continuing: that is, that the stay order remains in effect pending defendant's intended appeal (or a determination not to appeal). In that event, plaintiffs wish to be deemed to have moved for modification of the stay order so that defendant may be required to start the determinations of domicile as outlined above. The unusual length of time that the Court's original order will have been on appeal

makes such a modification necessary because the premise of the August 3, 1976, stay order — no substantial harm to plaintiffs — no longer applies.

If Your Honor desires further comment on any of the issues addressed in this letter, we shall be happy to respond promptly.

Sincerely yours,

ALFRED L. SCANLAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion of October 31, 1979, 480 F. Supp. 1116, and the Court's memorandum opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its In-State Policy hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the State.

2. Before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebuttable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment.

3. Before, on, and after June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens the opportunity to establish "in-state" status, was and is unconstitutional as it was and is in violation of the

Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause.

4. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

5. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy as applied before and after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the memorandum opinion of April 17, 1980, and paragraph 3 of this order.

6. The class represented by the named plaintiffs, which was initially defined at 420 F. Supp. 541, 564, and subdivided to include the following subclass by this Court's order of April 17, 1980:

> "All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa,"

is hereby further subdivided to include the following subclass within the originally defined class:

> "All persons who, beginning June 23, 1978, and during any period of time thereafter, have resided in Maryland and attended the University of Maryland, and who have held or have been named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or have been financially dependent upon a person holding or named within such a visa."

7. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's In-State Policy, as it was in effect prior to June 23, 1978, or has been in effect subsequent to June 23, 1978, with respect to the named

plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to in-state status for purposes of tuition and charge differential determinations.

8. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

9. For purposes of paragraph 8 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester.

10. In making the determinations of domicile required by paragraph 9 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a

G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

11. The Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

LETTER TRASMITTING PROPOSED ORDER

May 28, 1980

Alfred L. Scanlan, Esq.
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C., 20036

David H. Feldman, Esq.
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202

Re: *Moreno v. Toll*
Civil Action No. M-75-691

Dear Counsel:

Enclosed herewith will be found a draft of a proposed Order which I am contemplating entering in this case. I wish to have a conference in connection with this Order on June 6, 1980, at 4:30 p.m. In the event that counsel are able to agree on an Order, please notify me in advance because, in that event, it will be unlikely that it would be necessary to have a conference.

Very truly yours.

JAMES R. MILLER, JR.,
United States District Judge.

PROPOSED ORDER

For the reasons stated in the Court's Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116 (D. Md. 1979), and in the court's Memorandum Opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That the University of maryland's "In-State Policy," as enforced prior to June 23, 1978, which denied G-4 aliens

the opportunity to establish "In-State" status through the use of an irrebuttable presumption of non-domicile, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That the University of Maryland's "In-State Policy," as enforced on, before, and after June 23, 1978, which denies G-4 aliens the opportunity to estblish "In-State" status, is unconstitutional as it is in violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause;

3. That the court's Order of July 13, 1976, 420 F. Supp 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy" prior to June 23, 1978:

4. The court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy," as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the Memorandum Opiniono f April 17, 1980, and Paragraph 2 of this Order.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy" as it was in effect prior to June 23, 1978, or as it has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to "In-State" status for purposes of tuition and charged differential determinations:

6. That as to the plaintiff subclass, as defined by Order of this court, dated April 17, 1980,[1] the defendant shall

[1] The plaintiff subclass was defined as follows:
"All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or financially dependent upon a person holding or named within such a visa."

refund the difference, plus interest at the legal rate, between (1) "out of state" charges assessed to and paid by or on behalf of the members of the said subclass and (2) "In-State" charges that would have been assessed to and paid by or on behalf of members of the plaintiff subclass for the fall semester of 1976 or for any subsequent semester, and courses taken, prior to June 23, 1978, which said other charges or assessments would have been made pursuant to this court's Order of July 13, 1976, but for the stay of that Order which was granted pending appeal (*see* Order dated August 3, 1976);

7. For purposes of paragraph numbered 6 of this Order, the determination of which members of the subclass would have been granted reclassification to "In-State" status but for the stay pending appeal shall be based on the following determination of domicile: Whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester;

8. In making the determinations of domicile required by Paragraph 7 of this Order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland solely on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party;

9. The court reserves the question of court costs and attorneys' fees.

JAMES R. MILLER, JR.,
United States District Judge.

NOTICE OF APPEAL

(Filed May 30, 1980)

Notice is hereby given that John S. Toll, President, University of Maryland, the defendant above named, pursuant to 28 U.S.C. § 1292(a)(1), hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order granting an injunction entered in this action on the 30th day of May, 1980.

Dated: May 30, 1980

Signatures omitted

AMENDED NOTICE OF APPEAL

(Filed June 27, 1980)

Notice is hereby given that:

1. John S. Toll, President, University of Maryland, a defendant above named, pursuant to 28 U.S.C. § 1292(a)(1), hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order granting an injunction entered in this action on the 30th day of May, 1980;

2. The University of Maryland and John S. Toll, President, University of Maryland, the defendants above named, pursuant to 28 U.S.C. § 1291, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the judgment entered in this action on the 30th day of May, 1980; and

3. John S. Toll, President, University of Maryland, a defendant above named, pursuant to 28 U.S.C. § 1291, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the amended judgment entered in this action on June 24, 1980.

Attached to this amended notice of appeal are copies of all of the correspondence between counsel and the court that relates to the form and content of the order granting an injunction entered in this action on the 30th day of May, 1980, which implements the court's memorandum opinions of October 31, 1979, and April 17, 1980.

Dated: June 27, 1980.

Signatures omitted

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

ALFRED L. SCANLAN
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August 14, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the courts below correctly held that the University of Maryland's policy of denying the benefits of in-state status to aliens holding nonimmigrant "G-4" visas (under 8 U.S.C. § 1101(a)(15)(G)(iv)) even when they are domiciled in Maryland, while granting such benefits to citizens and immigrant aliens domiciled in Maryland, creates a classification based on alienage that is subject to "strict judicial scrutiny" and violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the courts below correctly held that the University's above-mentioned policy with respect to aliens holding G-4 visas interferes with Congress's exclusive control over immigration, in violation of the Supremacy Clause of the Constitution, by imposing discriminatory burdens on such visaholders domiciled in Maryland.

3. Whether the courts below correctly held that, for the two-year period between the District Court's initial order and the University's "Clarifying Resolution" of June 23, 1978, the University's policy of refusing to allow aliens holding G-4 visas to prove Maryland domicile for the purpose of obtaining the benefits of in-state status, while at the same time basing the award of such status on Maryland domicile, created an irrebuttable presumption in violation of the Due Process Clause of the Constitution.

4. Whether the courts below correctly held that the University is required to make refunds of tuition differentials to plaintiffs and members of their class for the period between the date of the first injunctive order in 1976 and the date of the most recent injunctive order in 1980, on the ground that the University had agreed to

such refunds as a condition of a stay pending appeal and thus waived any Eleventh Amendment immunity.*

* Though not presented in the petition, the following issues would also have to be resolved against respondents for the judgment of the Court of Appeals to be reversed: (1) whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Equal Protection Clause even if "strict judicial scrutiny" were not appropriate; and (2) whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Supremacy Clause of the Constitution by interfering and conflicting with the objectives of international agreements to which the United States is a party.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2178

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Juan Carlos Moreno *et al.* respectfully request that the petition for writ of certiorari filed by petitioners the University of Maryland and its President, John S. Toll, (hereinafter "the University") be denied.

STATEMENT

The University's statement of the case (Pet. 4-14) is argumentative rather than objective. The arguments set forth therein will be answered in the Argument of this brief. A concise and objective statement of the relevant facts and of the history of this case may be found in the Court of Appeals' opinion of March 26, 1981 (App. 2a-5a) and in the District Court's opinion of October 31,

1979 (App. 11a-20a). We merely highlight here the relevant facts demonstrating that, contrary to the University's assertions, this case does not present any substantial federal question meriting review by this Court.

The University attempts to paint this case as involving high stakes and important issues. It claims, for example, that this case affects "most public colleges and universities in the United States" (Pet. 14), would "permit *all* categories of nonimmigrants including foreign students (F & J visaholders) to be eligible for in-state benefits" (*id.* n.13), and "raises novel and important questions of constitutional law that transcend the huge amounts of money at stake for public colleges and universities across the nation" (*id.* 29). These assertions are untrue and misleading. This case involves only a limited class of nonimmigrant aliens residing in discrete sections of the country, and raises only limited issues. It does not involve or have implications for all categories of nonimmigrant aliens. Rather, it affects only the holders of "G-4" visas —*i.e.*, officers or employees of public international organizations and their immediate families (most, if not all, of whom reside in the Washington, D.C., and New York City metropolitan areas)—and a few other categories of nonimmigrant visaholders whom this Court has already held are capable of being domiciled in the United States. The basic issue in this case is whether such individuals, if domiciled in Maryland, may be barred from obtaining the benefits of in-state status at the University of Maryland when all other domiciliaries of Maryland are allowed to obtain those benefits. Questions regarding other nonimmigrant aliens (such as foreign students), who are precluded from establishing Maryland domicile by virtue of federal law, are not presented by this case.

The University of Maryland's In-State Policy at issue here (App. 167a-171a) governs the award of in-state status for purposes of obtaining the lower, in-state tuition

and fee rates at the University and for purposes of obtaining more favorable treatment for admission to the University. That policy allows citizens and immigrant aliens to obtain such in-state status (for themselves and their dependents) upon a showing that they are domiciled in Maryland, but it prohibits all nonimmigrant aliens from obtaining in-state status. Obviously, such a clear exclusion of a class of aliens from state-granted benefits must have some justification. Until the University's "Clarifying Resolution" of June 23, 1978 (App. 172a-175a), the University attempted to justify the exclusion on the ground that its In-State Policy was based on domicile and that the reason nonimmigrant aliens were excluded was that they could not be domiciled in Maryland under state law. See this Court's opinion in *Elkins* v. *Moreno*, 435 U.S. 647, 658-60 (1978) (App. 114a-116a).

The respondents—dependents of employees of international banks (specifically, the Inter-American Bank and the International Bank for Reconstruction and Development)—brought a class action in 1975 challenging that policy, as applied to them, on due process, equal protection, and Supremacy Clause grounds. They argued that they and their fathers could be and were in fact domiciled in Maryland, even though they and their fathers held nonimmigrant G-4 visas and even though their fathers were exempt from income taxes on their bank salaries under the international agreements establishing the organizations and under federal statute (App. 59a-62a).[1] The

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[1] Nonimmigrant aliens are permitted to enter the United States under twelve different classifications, which correspond to the different visas that they hold (8 U.S.C. § 1101(a)(15)(A) through (L)). The G-4 category is for "officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act (IOIA), 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families" (8 U.S.C. § 1101(a)(15)(G)(iv)). These organizations are established pur-

University argued, however, that G-4 visaholders are necessarily precluded by the terms and conditions of their visas from being domiciled in Maryland (App. 79a). In its decision of July 13, 1976, the District Court rejected that contention, holding that nothing in either federal immigration law or the Maryland law of domicile prevented a G-4 visaholder from being domiciled in Maryland (App. 79a-88a). The court concluded that the University's policy created an irrebuttable presumption of non-domicile that was not necessarily true for G-4 visaholders, and thus denied those visaholders due process of law under *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (App. 88a-89a, 98a). The Court of Appeals affirmed (App. 101a-102a).

On writ of certiorari, this Court confirmed that *Vlandis* squarely governed this case, and it then proceeded to examine the question whether G-4 visaholders could be domiciled in Maryland. *Elkins* v. *Moreno*, *supra*, 435 U.S. at 660-62 (App. 116a-118a). The Court held that, unlike most nonimmigrant aliens, G-4 visaholders (along with a few similar categories of nonimmigrant visaholders) were not precluded by federal law from being domiciled in the United States. 435 U.S. at 663-68 (App. 119a-124a). The Court observed that with respect to most of the twelve major categories of nonimmigrant aliens listed at 8 U.S.C. § 1101(a)(15)(A)-(L), Congress expressly con-

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suant to treaties and international agreements to which the United States is a party. Under those agreements, as well as by virtue of the IOIA, the employees of the organizations who are not U.S. citizens are exempt from federal, state, and local income taxes on their salaries from such organizations. See Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, § 9(b); Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, § 9(b); International Organizations Immunities Act, § 4(b), 59 Stat. 670, amending Internal Revenue Code, now codified at 26 U.S.C. § 893. However, they pay all other applicable federal, state, and local taxes.

ditioned admission to the United States on the alien's intent not to abandon his foreign residence and, by implication, not to establish domicile in the United States. 435 U.S. at 665-66 (App. 121a-122a). For example, foreign students admitted pursuant to 8 U.S.C. § 1101 (a) (15) (F) are defined as "having a residence in a foreign country which [they have] no intention of abandoning." By contrast, the Court noted, G-4 visaholders and a few other limited categories of nonimmigrant visaholders—such as those who enter under certain treaties of commerce (§ 1101 (a) (15) (E)) and certain foreign media representatives (§ 1101 (a) (15) (I))—were exempted by Congress from such conditions. Accordingly, the Court stated, Congress "was willing to allow [such] nonrestricted nonimmigrant aliens to adopt the United States as their domicile." 435 U.S. at 666 (App. 122a).

Having resolved that question of federal law, this Court certified to the Maryland Court of Appeals the question whether G-4 visaholders were "incapable *as a matter of state law* of becoming domiciliaries of Maryland." 435 U.S. at 669 (App. 124a-125a) (emphasis added). That court, in *Toll* v. *Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (App. 137a), answered the certified question "No," stating that "nothing in the general Maryland law of domicile renders G-4 visaholders, or their dependents, incapable of becoming domiciled in this state" (App. 156a).

Thus, it is clear that G-4 visaholders can be domiciled in the United States and in Maryland. Of course, not every G-4 visaholder residing in Maryland will be domiciled there; such individuals must still meet the general test for Maryland domicile (based on intent) discussed by the Maryland Court of Appeals in *Toll* v. *Moreno*, *supra* (App. 149a-153a). The important fact is that these visaholders, unlike most nonimmigrants, can establish domicile in Maryland, and that it is this limited class of

nonimmigrant visaholders, not the general class of nonimmigrants, with which this case is concerned.[2]

The University, however, did not simply accept these decisions and apply its test of domicile to all students (or their parents) who could be domiciled in Maryland, including the G-4 visaholders. Rather, on June 23, 1978, the University adopted a "Clarifying Resolution" (App. 172a-175a). That resolution did not purport to amend the In-State Policy; indeed, it specifically "reaffirmed" that policy (¶ 4). It stated, however, that that policy had adopted a definition of domicile that excluded all nonimmigrant aliens (even those who could in fact be domiciled in Maryland under federal law and Maryland law) (¶ 2), and that that policy served a number of purposes and interests "whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law" (¶ 3). Obviously, this resolution was not necessary to exclude the great majority of nonimmigrants from in-state status; they would have been excluded under an even-handed test of domicile. Rather, the resolution affected only the G-4 and similar visaholders who could otherwise have qualified for in-state status under the test of domicile applicable to citizens and immigrant aliens.

When the case returned to this Court from the Maryland Court of Appeals, the petitioners advised this Court of the adoption of the Clarifying Resolution. Without further briefing, this Court then issued its *per curiam* opinion in *Toll* v. *Moreno*, 441 U.S. 458 (1979) (App. 157a-160a), vacating the judgment of the Court of Appeals and remanding the case to the District Court "for further consideration in light of our opinion and judg-

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[2] The University asserts that there were 493 nonimmigrant students registered at the University in the fall of 1979 (Pet. 6). In fact, the correct number is 554 (C.A. Jt. App. 189). Of these, only 72 were G-4 visaholders (*id.*).

ment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (App. 160a).

Following remand from this Court, the District Court and the Court of Appeals again held in favor of the respondents in the decisions of which the University now seeks review.

SUMMARY OF ARGUMENT

Contrary to the University's claims, the issues involved in this case are of limited significance and were correctly decided by the courts below.

(1) The courts below held that the University's In-State Policy, both before and after the Clarifying Resolution, violates the Equal Protection Clause. That holding rests firmly on the established principle that state classifications based on alienage are inherently suspect and subject to strict judicial scrutiny. This principle applies even when the enactment discriminates only against a certain sub-class of aliens rather than against all aliens, so long as the enactment "is directed at aliens and . . . only aliens are harmed by it." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). The University's In-State Policy falls within this proscription. It allows citizens and immigrant aliens who are Maryland domiciliaries to obtain in-state status, but it denies such status to G-4 and similar nonimmigrant visaholders who are likewise Maryland domiciliaries. Even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and harms *only* aliens.

The University does not deny that its In-State Policy cannot withstand a test of strict scrutiny. Rather, it contends that the strict-scrutiny test should not apply to discrimination against nonimmigrant aliens, and it

advances a number of reasons why such discrimination against nonimmigrants generally should be judged by the more lenient "rational basis" test. These arguments, however, ignore the fact that the constitutional defect in the University's policy is not that it denies the benefits of in-state status to all nonimmigrant aliens, but that it denies such benefits to the G-4 and similar nonimmigrant aliens *who are Maryland domiciliaries.* They are the only individuals harmed by the University's policy. This case thus does not present a major test of the States' power to impose restrictions on nonimmigrant aliens generally; it simply involves a situation in which a state university has decided to treat a very few of the state domiciliaries less favorably than other domiciliaries solely because they hold nonimmigrant alien visas. At least in these limited circumstances, there is no basis for upsetting application of the strict-scrutiny test.

(2) The courts below also held that the University's In-State Policy encroached upon the exclusive federal power over immigration and naturalization, in violation of the Supremacy Clause, by imposing on a sub-class of aliens domiciled in the United States discriminatory burdens in addition to the conditions imposed by Congress. The University claims that this holding fashions a rule under which an automatic violation of the Supremacy Clause follows from every denial of equal protection to nonimmigrant aliens. As we will show, the courts below constructed no such *per se* rule, but merely imposed the standards enunciated in opinions of this Court. But even if the holdings below had established such a rule, that would present no question of practical importance warranting this Court's review, because every state enactment subject to such a rule would by definition already be unconstitutional under the Equal Protection Clause.

(3) The University also challenges the holding of the courts below that, until the June 23, 1978 Clarifying Resolution, the University's In-State Policy created an irrebuttable presumption that denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, *supra*. As we demonstrate below, this Court in *Elkins* v. *Moreno*, *supra*, held that the present case falls squarely within *Vlandis;* and its decision in *Toll* v. *Moreno*, *supra*, which remanded the case for consideration of the intervening Clarifying Resolution, did not decide to the contrary. In any event, regardless of the merits of the due process question, that question is not of any substantial importance here, since the policy was held unconstitutional on other grounds and since the due process holding applies, as an alternative ground, only to a two-year period prior to June 23, 1978. Since it is now clear that the denial of in-state status to G-4 visaholders cannot be justified on the ground that they cannot be domiciled in the State, the irrebuttable-presumption issue should not arise again in the present context. Accordingly, there is no reason for this Court to grant certiorari in this case to decide whether to overrule *Vlandis*, as the University asks.

(4) In its order of May 30, 1980 (App. 48a-50a), the District Court reaffirmed its order of July 13, 1976, and ordered the University, as an implementation of the conditions of the initial stay pending appeal (App. 99a-100a), to make refunds of the difference between out-of-state and in-state tuition and charges to any member of the respondent class who could show Maryland domicile (under state law principles) for the period from July 13, 1976, to date. As we will show, the University's claim that this refund order violates the Eleventh Amendment was properly rejected by both courts below. In any event, since the issue turns on the construction of representations made by the University in this case to obtain a stay pending appeal, it presents no question of general significance meriting review by this Court.

ARGUMENT

I. The Lower Courts' Holding That the University's Policy Violates the Equal Protection Clause Is Based on Established Precedent and Does Not Present a Substantial Question Warranting Review.

It is by now well established that state classifications based on alienage are inherently suspect and are "subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971). See also *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 601-02 (1976); *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7. In *Nyquist*, this Court made clear that this principle applies even when the state enactment discriminates only against a sub-class of aliens. In that case, New York contended that a state statute which barred financial assistance for higher education to aliens who had neither applied for citizenship nor submitted a statement of intent to do so "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens *vel non*." 432 U.S. at 7-8. The Court rejected that argument, pointing out that the statute "is directed at aliens and that only aliens are harmed by it, [and] [t]he fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* at 9. Likewise, the state statute struck down in *Graham* v. *Richardson*, *supra*, had not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

As the courts below recognized, the University's In-State Policy falls directly within the principles of those decisions. That policy on its face treats a sub-class of aliens—G-4 and other nonimmigrant aliens—differently

from citizens and immigrant aliens. Under it, citizens and immigrant aliens are granted in-state status if they can show domicile in Maryland. Nonimmigrant aliens, however, are flatly barred from becoming classified as in-state, even though in fact some subcategories of nonimmigrants—namely, G-4 and similar visaholders—can be domiciled in Maryland under state and federal law.

Since the University, in attempting to justify this discrimination, refers repeatedly to the denial of in-state benefits to nonimmigrant aliens *in general*, it is important to emphasize that the effect of the discrimination worked by the policy falls only on nonimmigrant aliens *who are domiciled in Maryland*. Respondents have never contended that the University's policy of denying in-state benefits to nonimmigrant aliens is unconstitutional as applied to nonimmigrant visaholders who are unable as a matter of federal law to establish domicile in a State of this nation. Such nonimmigrants are in no way harmed by the University's policy, because even if they were accorded equal treatment with citizens and immigrant aliens—*i.e.*, subject to a test of domicile—they would invariably fail to qualify for in-state status. Rather, the disadvantaged class consists of the G-4 and few other categories of nonimmigrant visaholders who, under the principles of this Court's decision in *Elkins*, are capable of establishing domicile in Maryland. See pp. 4-5, *supra*. They, unlike most nonimmigrants, would enjoy the benefits of in-state status if they were treated on an equal basis with other Maryland domiciliaries who happen to be U.S. citizens or immigrant visaholders. Thus, the classification established by the University's policy is between two kinds of Maryland domiciliaries: citizens and immigrant aliens who are domiciled in Maryland are allowed to obtain in-state status; G-4 and similar nonimmigrant aliens *who are likewise so domiciled* under state law are not. The latter are the only Maryland domiciliaries precluded from prov-

ing their domicile and thus obtaining in-state status. As in *Nyquist*, even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and disadvantages *only* aliens. Hence, the classification is a suspect classification based on alienage and is accordingly subject to strict judicial scrutiny (which the University admits the policy cannot withstand).

In an effort to avoid the impact of this analysis, the University contends that the strict-scrutiny standard was erroneously applied by the courts below, because the individuals discriminated against hold nonimmigrant rather than permanent resident visas. It claims that this Court should grant certiorari to hold that discrimination against nonimmigrant aliens should not be judged by a strict-scrutiny standard. However, none of the reasons advanced by the University in support of its position provides any justification for this Court to review the question in the context of the present case.

The first reason advanced to show why strict scrutiny is not appropriate here is that all prior cases in which this Court has applied that standard have involved a statute or practice that discriminated against permanent resident aliens. The University then claims that this Court's opinions in those cases suggest that its decisions to apply strict scrutiny were limited to discrimination against immigrant aliens (Pet. 15-17). That contention is erroneous. It is true that the above-cited cases applying strict scrutiny involved either aliens in general or permanent resident aliens and that the Court did at times refer to the attributes of permanent resident aliens. But that simply reflects the fact that the enactments in those cases had no practical effect on the great majority of nonimmigrant aliens and were not being challenged by nonimmigrants. See, *e.g.*, *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 4 ("Since many aliens, such as those here on student visas, may be precluded by federal law from es-

tablishing a permanent residence in this country . . . the bar of [the challenged statute] is of practical significance only to resident aliens").[3] This Court has never suggested in any of its cases that different modes of analysis apply to alienage-based classifications depending upon the visa status of the aliens discriminated against. Rather, recognizing that aliens constitute a " 'discrete and insular' minority" for whom "heightened judicial solicitude is appropriate" (*Graham* v. *Richardson, supra*, 403 U.S. at 372), the Court has held that classifications based on alienage are suspect and subject to strict scrutiny, and that a classification is based on alienage for these purposes, even if it does not harm all aliens, if, as here, it is directed at aliens and harms only aliens (*Nyquist* v. *Mauclet, supra*, 432 U.S. at 9). This analysis is not limited to immigrant aliens. Indeed, the Court's references to the attributes of permanent resident aliens, cited by the University (Pet. 16), were made in the context of determining whether the enactments in question could survive strict scrutiny, not whether strict scrutiny applied. *Graham* v. *Richardson, supra*, 403 U.S. at 376; *Nyquist* v. *Mauclet, supra*, 432 U.S. at 12. See also *Sugarman* v. *Dougall, supra*, 413 U.S. at 645.

It must be remembered, moreover, that in the present case the discrimination worked by the University's policy falls only on the G-4 and similar nonimmigrant visaholders who are similarly situated to citizens and immigrant aliens with respect to the establishment of domicile in this country and in Maryland. They may live in the State for many years and contribute to the economic

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[3] Similarly, since most nonimmigrant visaholders (unlike G-4 and similar nonimmigrant aliens) are present in this country on only a temporary basis for limited purposes, they would not ordinarily be in a position to apply for a license to practice law (*In re Griffiths, supra*), for state civil service employment (*Sugarman* v. *Dougall, supra*), or for welfare benefits (*Graham* v. *Richardson, supra*).

growth of the State through the payment of all taxes except taxes on their salaries from the international organizations.[4] They are, indeed, domiciled in the State under the State's own law. At the least, therefore, discrimination against these aliens is appropriately judged under a strict-scrutiny test, as the courts below held. The District Court stated that, while these nonimmigrant aliens are not admitted as permanent resident aliens for visa purposes, they may be classified as "resident aliens" for present purposes if their place of general abode (*i.e.*, their domicile) is within the United States (App. 36a-37a), and that States must justify classifications discriminating against such "resident aliens, whether immigrant or nonimmigrant, under a strict scrutiny standard" (App. 38a).[5]

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[4] As noted above (n.1, pp. 3-4), the G-4 visaholders' exemption from taxes on their international bank salaries is established by international agreements to which the United States is a party, as well as by federal statute. This tax exemption was adopted for the benefit of the international organizations and their member nations, and cannot be waived by individual employees. See 41 Op. Atty. Gen. 170, 172-73 (1954). That exemption is clearly an insufficient reason to lower the equal protection standard applicable to state action discriminating against aliens who are domiciled in the State. This is particularly clear since the University makes no effort to classify other domiciliaries of the State—*i.e.*, citizens and immigrant aliens—on the basis of their tax liability or payments.

[5] It is for this reason that the arguments of Professor Rosberg, so heavily relied on by the University, do not support its contention. Rosberg makes clear that his thesis is premised on the fact that nonimmigrants "cannot have an intention of remaining here indefinitely . . . ." G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, S. Ct. Rev. 275, 312 (1977). That article was written prior to, and does not take account of, this Court's holding in *Elkins* that G-4 and a few similar categories of nonimmigrant visaholders *can* have the intention of remaining in the United States indefinitely. It should also be noted that, in a portion of his article not quoted by the University, Rosberg cites the District Court's initial decision in this case with approval. *Id.* at 313 n.143.

The second argument advanced by the University for why strict scrutiny should not apply is that, since many aliens are eligible for in-state benefits, "it is irrational to contend that the in-state policy denies its benefits on the basis of alienage" (Pet. 17). In *Nyquist* the petitioner similarly contended that the statute in question distinguished "only within the 'heterogeneous' class of aliens" and not "between citizens and aliens *vel non*." 432 U.S. at 8. As noted above, this Court expressly rejected that argument, stating that "[t]he important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." 432 U.S. at 9. Here, as in *Nyquist*, although not all aliens are barred from in-state benefits by the University's policy, the policy is directed at a sub-class of aliens and only aliens are harmed by it. Hence, strict scrutiny is the applicable standard.

The University's third argument is that strict scrutiny should not apply because "in-state tuition and fees are not 'necessities of life'" (Pet. 18). Again, this argument was raised in *Nyquist:* "Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien 'access to the necessities of life.'" 432 U.S. at 8 n.9. This Court rejected that contention, noting first that the statement of purpose in the statute itself referred to higher education as a "necessity," and stating further that

> "in any event, the Court noted in *Graham* v. *Richardson* . . . that classifications based on alienage 'are inherently suspect and are therefore subject to strict scrutiny *whether or not a fundamental right is impaired.*'" (Emphasis added.) *Id.*

The University seeks to avoid this result by citing the Chief Justice's statement in *Foley* v. *Connelie*, 435 U.S.

291, 295 (1978), that the exclusions in prior cases applying strict scrutiny, including *Nyquist*, "struck at the noncitizen's ability to exist in the community," and by claiming that only a "dollar differential, not a right to education, is at stake here" (Pet. 18). In fact, however, as the Chief Justice recognized in *Foley* (435 U.S. at 295 n.4), the "necessity" referred to in *Nyquist* was the necessity of higher education, not of the aid to education. The actual benefits involved in *Nyquist*—namely, loans, tuition assistance, and scholarships in aid of higher education—are analytically indistinguishable from the financial benefits of lower tuition and fee rates at the University of Maryland. Moreover, the benefits of in-state status at the University of Maryland are not limited to a "dollar differential," but also encompass more lenient admission standards, which can be crucial to the students' ability to enter the University at all. In any event, as this Court recognized in *Nyquist*, classifications based on alienage are subject to strict scrutiny regardless of the nature of the underlying right or benefit in question.[6]

Fourth, the University asserts, without citation of precedent, that strict scrutiny should not apply here because its policy is "consistent with the purposes of federal immigration law," since "the Federal Government has no policy in favor of according educational benefits to nonimmigrants—in fact, just the opposite" (Pet. 18, 19). The simple answer to this contention is that, as this Court has made clear, "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not

[6] The Court in *Foley* recognized an exception to this rule where aliens are excluded from a "governmental function" involving "discretionary decision-making, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. See also *Ambach* v. *Norwich*, 441 U.S. 68 (1979). That "governmental function" exception obviously does not apply here.

shared by the States." *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8. See also *Mathews* v. *Diaz*, 426 U.S. 67, 79-87 (1976). Thus, the fact that Congress or the federal government may have drawn certain lines respecting aliens in the distribution of benefits implies nothing about a State's power to act in a similar fashion.[7] Indeed, the Court in *Nyquist* made clear that it is not even permissible for a State to attempt to justify a policy by reference to concerns touching upon immigration or naturalization. 432 U.S. at 10.

Thus, the University has presented no valid reason for this Court to review the lower courts' application of strict scrutiny in the context of the present case.[8] This issue, moreover, does not appear to have any broad or far-reaching effect. As noted above, it does not affect the majority of nonimmigrants, but only the G-4 and few similar categories who can be domiciled in Maryland. There are not many such visaholders at the University of Maryland (see n.2, p. 6, *supra*); and, at least as to G-4's, very few, if any, are likely to reside outside the Washington, D.C., and New York City areas. To our knowledge, there is no other university in those

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[7] As a matter of fact, the University is in error in asserting that the statute upheld in *Mathews* v. *Diaz* drew a line between citizens and immigrants, on the one hand, and nonimmigrants, on the other (Pet. 19). That statute denied Medicare benefits not only to nonimmigrants but also to some immigrants (*i.e.*, those who had not resided in the United States for five continuous years immediately preceding application for benefits).

[8] While we do not argue the point here, we preserve our position that even if the classification created by the University's In-State Policy were not subject to strict scrutiny, it is still invalid as essentially arbitrary and not rationally related to the interests advanced to support it, as applied to the G-4 (and similar) aliens disadvantaged by the policy. While the District Court suggested that the University's policy would "arguably" meet a rational-basis test (App. 42a), it did not decide that question in the University's favor.

areas with a policy similar to the University of Maryland's In-State Policy in its treatment of G-4 visaholders. Furthermore, we are not aware of any other significant state restrictions, outside the university context, treating such G-4 (and similar) visaholders domiciled in the State differently from citizens and immigrant visaholders so domiciled. The equal protection issue, then, both was correctly decided and is of limited impact, and thus does not warrant this Court's review.[9]

II. The Lower Courts' Holding That the University's Policy Violates the Supremacy Clause Does Not Present a Substantial Question Warranting Review.

The courts below held that the University's In-State Policy constitutes an encroachment on the exclusive federal power over, and policies involving, immigration and naturalization, in violation of the Supremacy Clause. Contrary to the University's argument, that holding does

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[9] The University refers in a footnote to *Cabel* v. *Chavez-Salido, prob. juris. noted,* No. 80-990, 49 U.S.L.W. 3663 (Mar. 9, 1981), and *Plyler* v. *Doe, prob. juris. noted,* No. 80-1538, 49 U.S.L.W. 3824 (May 4, 1981), although it rightly recognizes that those cases are not relevant to the instant case (Pet. 20 n.19). The *Cabel* case involves the applicability of the "governmental function" exemption to the strict-scrutiny standard (which exception was enunciated in *Foley* v. *Connelie, supra*) to a state statute requiring U.S. citizenship to be a "peace officer." See 490 F. Supp. 984 (C.D. Cal. 1980). As noted above (n.6, p. 16), that exception clearly does not apply here. The *Plyler* case (consolidated in this Court with *Texas* v. *Certain Named & Unnamed Undocumented Alien Children, prob. juris. noted,* No. 80-1934, 49 U.S.L.W. 3930 (June 15, 1981)) involves the denial of free public education to illegal aliens—which the Fifth Circuit held to be a violation of the Equal Protection Clause under either a strict-scrutiny or a rational-basis standard. 628 F.2d 448, 458 (1980). That case does not deal with the question of the standard to be applied to an enactment discriminating against a class of *legal* aliens—which is an entirely different matter in fact and law. Even if this Court reversed the decision in *Plyler,* that action would have no effect on the outcome of the present case.

not present a substantial issue meriting this Court's review.

It has been established by several decisions of this Court that state laws or regulations "which impose discriminatory burdens [not created by Congress] upon the entrance *or residence* of aliens lawfully within the United States conflict with [the] congressionally derived federal power to regulate immigration . . . ." *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419 (1948) (emphasis added). See also *DeCanas* v. *Bica*, 424 U.S. 351, 358 n.6 (1976); *Graham* v. *Richardson*, *supra*, 403 U.S. at 378-79. In *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, the Court explained:

> "The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first [is] based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment . . . . *The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2*, and in the naturalization power, Art. I, § 8, cl. 4, *recognizes the Federal Government's primary responsibility in the field of immigration and naturalization.*" (Emphasis added.)

The Court then went on, without distinguishing between these two bases, to hold that, while the States have some discretion in adopting enactments restricting benefits to aliens, "[i]n each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Id.* at 605.

Following this analysis, the District Court here noted that that standard "is essentially the strict scrutiny analysis previously discussed in reference to the Equal Protection arguments"; and it held that since the University had failed to meet that standard in attempting to justify the discriminatory treatment of the respondent class of aliens under its policy, that policy violated the Supremacy Clause as well as the Equal Protection Clause (App. 47a).

The University argues that the principles of the foregoing cases do not apply to state action which discriminates only against nonimmigrants, which does not involve a "necessity of life," and which is harmonious with a federal statute or regulation (Pet. 21). As with the equal protection issue, however, the principles of the above decisions are not so limited. The University's policy violates those principles because it imposes a discriminatory burden on G-4 and similar nonimmigrant visaholders domiciled in Maryland by preventing them, but not citizens or immigrants domiciled in the State, from obtaining the benefits of in-state status.

The University also argues that the decisions below improperly fashioned "a rule automatically invalidating on supremacy clause grounds every asserted discrimination against an alien subclass" (Pet. 21). The courts below, however, constructed no such *per se* rule; they merely imposed the standard enunciated by this Court in *Examining Board* and, under that standard, found the University's form of discrimination against a sub-class of aliens to be wanting.

In any event, the Supremacy Clause holding of the courts below does not present a significant issue warranting this Court's review. Since the University's policy was held invalid on equal protection grounds, the Supremacy Clause holding was simply an additional ground for the same result. Indeed, even if the holdings below had es-

tablished a *per se* rule automatically invalidating on Supremacy Clause grounds every violation of the Equal Protection Clause, such a rule would be of little practical importance, since every enactment subject to such a rule would already be unconstitutional on equal protection grounds, and the Supremacy Clause ground would merely be cumulative.[10]

III. The Lower Courts' Holding That the University's Policy Violated the Due Process Clause Prior to June 23, 1978, Was Limited to a Two-Year Period and Does Not Warrant This Court's Review.

In their initial decisions in this case, the courts below held that the University's In-State Policy denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, 412 U.S. 441 (1973). As in *Vlandis*, the University's policy purported to be concerned with domicile as the test for in-state status, but it then denied to a group of individuals seeking to meet that test—G-4 and other nonimmigrant visaholders—any opportunity to prove that they did so, on the basis of a conclusive presumption that they could not have the requisite intent to establish Maryland domicile. As the courts found, that conclusive presumption was not universally true for G-4 visaholders (since they can establish Maryland domicile), and so it violated the Due Process Clause under *Vlandis*.

On review of those decisions, this Court in *Elkins* confirmed that *Vlandis* governed this case: "Because petitioner makes domicile the 'paramount' policy considera-

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[10] While we do not argue the point here, we specifically preserve our position—rejected by the District Court (App. 44a-45a) but not addressed by the Court of Appeals—that the University's policy also violates the Supremacy Clause by penalizing G-4 visaholders on account of, and to the extent of, their tax exemption granted by international agreements to which the United States is a party and thereby interfering with an important objective of those agreements.

tion and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi* [422 U.S. 749, 771 (1975)] to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'" 435 U.S. at 660 (App. 116a). In order to avoid a decision "on the continuing vitality of *Vlandis* . . . unless it is really necessary," *id.* at 661 (App. 117a), the Court certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 visaholders could be domiciled in Maryland as a matter of state law, *id.* at 668 (App. 124a). After that court held that they could be so domiciled, and after the University had in the meantime adopted its Clarifying Resolution of June 23, 1978, the case returned to this Court. Without further briefing, this Court in *Toll* remanded the case to the District Court for further consideration in light of this Court's opinion in *Elkins*, the Maryland Court of Appeals decision, and the Clarifying Resolution. 441 U.S. at 462 (App. 160a).

On remand, the courts below reaffirmed that the University's policy violated the Due Process Clause under *Vlandis* but *only* for the period prior to the date of the Clarifying Resolution. That holding, therefore, affects only a two-year period—from the date of the District Court's initial order (July 13, 1976) until the date of the Clarifying Resolution (June 23, 1978).

Despite the limited nature of this due process holding, the University claims that it presents an important issue regarding the viability of the irrebuttable-presumption doctrine. That claim is erroneous.

The University argues that the lower courts have embraced a "constitutional doctrine repeatedly shunned by this Court and soundly rejected by many of the circuit

courts of appeals" (Pet. 22). In response, it should be noted first that, while the irrebuttable-presumption doctrine has been limited by this Court and by lower courts, this Court in *Elkins* made clear that *Vlandis* squarely governed the present case. The University contends, however, that this Court's subsequent decision in *Toll* in effect reversed its holding in *Elkins* and decided that *Vlandis* was inapplicable to this case and that no irrebuttable presumption ever existed, thus removing the issue from the case entirely (Pet. 24-25). As the courts below recognized, that is a patent misreading of *Toll*.

In *Toll* this Court first took note of the Clarifying Resolution and stated that it appeared to remove the premise of *Elkins* that if G-4 visaholders could become Maryland domiciliaries, the University "would redraft its policy 'to accommodate' G-4 aliens . . . ." 441 U.S. at 461 (App. 160a). The Court then stated that "*if* domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . .'" 441 U.S. at 461-62 (App. 160a) (emphasis added). The Court did not decide *whether*, in light of the Clarifying Resolution, domicile was in fact any longer the "paramount" consideration; and it manifestly did not decide, as the University claims it did, that the resolution retroactively changed the "paramount" nature of domicile, and thus resolved the due process issue in the University's favor, for the period *prior to the date of the resolution*. The Court left those questions as among the "new issues" to be "addressed in the first instance by the District Court." 441 U.S. at 462 (App. 160a).[11]

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[11] The University asserts that "if the Court though[t] that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be 'overrule[d] or further limit[ed]'" (Pet. 25). That conclusion does not follow at all. This Court was faced with a new resolution which the University claimed showed a different basis

On remand, the courts below found that the Clarifying Resolution of June 23, 1978, did not retroactively change the University's paramount concern with domicile (under state law) for the period prior to that date (although it did afterwards). The courts therefore held that this case was still goverened by *Vlandis* for the period prior to June 23, 1978, but not afterwards. The University asks this Court to use that limited holding as a basis to review the irrebuttable-presumption doctrine as a whole and to overrule *Vlandis* (Pet. 26). Even apart from the merits of the question, this is hardly an appropriate case for the Court to undertake this task. The University's policy has been held invalid on equal protection and Supremacy Clause grounds for the entire period both before and after the Clarifying Resolution, and the due process holding simply provides an additional ground that is limited in effect to a two-year period over three years in the past—July 13, 1976, to June 23, 1978. The due process question thus does not have continuing importance in the context of the present case. Moreover, that question is unlikely to arise again, at least in similar circumstances. The only reason that the question originally arose is that the University tried to justify its policy on the ground that G-4 visaholders could not be domiciled in Maryland as a matter of state law. Since it is now clear that the denial of in-state benefits to such visaholders cannot be justified on that ground, the question should not arise again in the same way.

In light of all these circumstances, there is no good reason for this Court to review the due process holding of the courts below.

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for its In-State Policy from the one which the Court had previously found it had. The Court wanted to give the District Court the first opportunity to hear that claim and to address the questions of whether and how that resolution may have affected the issues.

IV. The Lower Courts' Holding That Refunds Are Appropriate Because the University Waived Its Eleventh Amendment Immunity Was Correctly Based on the University's Representations in This Case and Does Not Present a Substantial Question Warranting Review.

The District Court's order of May 30, 1980, besides reaffirming injunctive relief against enforcement of the University's In-State Policy, ordered the University to refund the difference between out-of-state and in-state charges to each class member whose status was determined by a G-4 visa for the fall semester of 1976 or for any subsequent semester and who would have been reclassified to in-state status but for the District Court's stay of its original order of July 13, 1976, pending appeal (¶ 6, App. 49a). The University's contention that this order violates the Eleventh Amendment was properly rejected by both courts below. In any event, since the issue turns on the construction of representations made by the University to obtain a stay of the original 1976 order, it presents no question of general significance meriting review by this Court.

The original order of July 13, 1976 (App. 98a) gave prospective relief only and thus raised no Eleventh Amendment issues. Had that order not been stayed, the University would immediately have had to cease charging affected class members the higher out-of-state tuition rate. Conversely, had a stay been granted without conditions, the University might have a valid argument that the Eleventh Amendment barred the District Court in 1980 from ordering refunds back to 1976. In fact, however, the 1976 order was stayed after a motion by the University in which it represented specifically that "plaintiffs will not suffer substantial harm if a stay is granted" (R. 439), and after an oral hearing at which the University's counsel made the representation, incorporated into the stay order itself, that in the event the court's injunctive order was "finally affirmed on appeal," the University would refund the relevant difference in

tuition to "each student whose status is currently determined by a G-4 visa and whose request for reclassification . . . would have been granted but for the stay" (App. 99a-100a).

The University does not deny that the condition attached to the stay order was an express waiver of Eleventh Amendment immunity. Rather, it argues (in its "first" and "third" points, Pet. 27 & 28-29) that the District Court's 1976 order was "effectively vacated" when this Court in *Toll* vacated the judgment of the Court of Appeals, and that thus that order can never be "finally affirmed on appeal" within the meaning of the original stay order. In addition, it argues (in its "second" point, Pet. 28) that, in any event, refunds for the period 1976 to 1978 are inappropriate. Both arguments are without merit.

1. The University's contention that this Court in *Toll* "effectively vacated" the 1976 order is inconsistent with the Court's language and with the logic of the situation. Respondents were defending the 1976 order in this Court on the due process ground that had been adopted by the courts below *and* on the equal protection and Supremacy Clause grounds that neither court had addressed. As shown above, this Court did not decide the due process question in the University's favor, and it plainly did not decide the equal protection and Supremacy Clause issues. Rather, it simply concluded that the intervening Clarifying Resolution raised "new issues of constitutional law which should be addressed in the first instance by the District Court." 441 U.S. at 462 (App. 160a). Accordingly, it "vacate[d] the judgment of the Court of Appeals"—not the judgment of the District Court—and "remand[ed] to the District Court for further consideration" in light of its opinion in *Elkins*, the Maryland Court of Appeals opinion, and the Clarifying Resolution. *Id.* This Court thus left it up to the District Court to decide whether, in light of the resolution, the due process ground still justified the injunction and, in any event,

whether the equal protection or Supremacy Clause arguments did so. It surely would not have vacated the 1976 order—and deprived the respondents of rights accruing under it—without addressing the various alternative grounds supporting it.

The University's contention that the case could not have been remanded for reconsideration without vacating the 1976 order (Pet. 27) ignores the broad authority granted by 28 U.S.C. § 2106 [12] and the fact that this Court has often remanded cases for reconsideration without vacating the underlying order or judgment. *E.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 111-12 (1976), and *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961).[13] Accordingly, the 1976 order was "finally affirmed on appeal" when the District Court reaffirmed that order (though in part on different legal grounds) in 1980, or will be "finally affirmed on appeal" when the instant appeal is over.[14]

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[12] "The Supreme Court . . . may . . . require such further proceedings to be had as may be just under the circumstances."

[13] The University cites *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 268 (1936), for the proposition that an appellate court cannot leave in effect the final decree of a district court and at the same time reinvest that court with jurisdiction to retry the case (Pet. 27). But the statement in question in that opinion was limited to the peculiar facts of the case, where the court of appeals had issued an ambiguous remand order which had been misunderstood by the district court. No stay of the district court order had been issued in that case, and there was no issue, as here, of rights that might be lost by virtue of the Eleventh Amendment if the district court order were vacated. In any event, that decision preceded the enactment of 28 U.S.C. § 2106, as well as the adoption of Rule 60, F.R.C.P., which allows a district court to reconsider a matter without upsetting its original order.

[14] Since the District Court stayed the 1980 order pending appeal on the same grounds as it had stayed the 1976 order, there is little practical difference between the two approaches. The first approach makes sense because (a) the further District Court proceedings were mandated by this Court and thus may be considered a continu-

If the University's position were correct, the result would be illogical and unfair. If this Court denies certiorari or affirms, then in not one court will the University have prevailed on the merits. The 1976 order will have been upheld as properly entered. It is incredible, under these circumstances, that the University should contend that it cannot now or ever be ordered to pay the money it expressly promised to refund, if necessary, in 1976. The upshot of this argument is that the University won the entire case up to May 30, 1980, regardless of the decision on the substantive issues. Both the District Court, which had heard argument on and signed the original stay order, and the Court of Appeals, which had adopted that stay order when it stayed its own mandate (App. 103a-104a), properly rejected this unreasonable interpretation of the order. The University's effort to escape the manifest intent of its representations does not merit further review.

2. Finally, the University suggests that, at the very least, refunds for the period after June 23, 1978, should not have been ordered, because "the in-state policy had been declared constitutional on due process grounds after that date . . . and was not declared unconstitutional on different grounds until May 30, 1980" (Pet. 28). This argument, made without any citation of authority, ignores the procedural posture of the case and was properly rejected by both courts below.

The District Court declared the In-State Policy unlawful and enjoined its application in 1976. The fact that the legal ground announced at the time—due process—was later changed for the period after June 23, 1978—to equal protection and supremacy—is irrelevant. Plaintiffs were entitled to defend the 1976 order on any legal grounds that supported it (see, *e.g.*, *Colautti* v. *Franklin*,

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ation of the initial appeal and (b) neither this Court nor the Court of Appeals retained jurisdiction of the case, so a new appeal had to be taken by the University from the 1980 order.

439 U.S. 379, 397 n.16 (1979)), and they did so. An order that is later affirmed on different grounds still stands from the time it was entered.

The University's argument might make sense if the University had in 1978 adopted a *new* in-state policy, which was not covered by the 1976 order. But the University admits that the Clarifying Resolution did not change the policy or result in a new policy (Pet. 26), and the resolution itself states that it "reaffirms" the original In-State Policy (¶ 4, App. 174a). Thus, the In-State Policy before and after June 23, 1978, was subject to the 1976 order. Accordingly, the University must make refunds for the entire period after that order (if it does not prevail in this Court), because it waived Eleventh Amendment immunity by agreeing to the conditions of the 1976 stay order.

CONCLUSION

Five years after the respondents obtained an order holding the University's In-State Policy unlawful as applied to them, the policy remains in effect, even though the University has never prevailed on the merits in three tiers of federal courts or in the Maryland Court of Appeals. The case does not merit further review by this Court. For this reason and the other reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,
Petitioners,

v.

JUAN CARLOS MORENO ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Juan Carlos Moreno *et al.* filed their brief in opposition to the petition for writ of certiorari on August 14, 1981. On August 24 and 25, 1981, respectively, respondents' counsel received copies of the brief of Alabama *et al.* as *amici curiae* and the motion for leave to file and brief of the American Council on Education *et al.* as *amici curiae*. Respondents submit this supplemental brief, pursuant to Rule 22.6 of this Court's Rules, to respond to those briefs of *amici curiae*, which represent "intervening matter not available at the time of the [respondents'] last filing" (Rule 22.6).

ARGUMENT

1. *Errors of Amici Curiae Regarding the Importance of This Case.* To begin with, the briefs of *amici curiae*, through a series of incorrect and misleading statements, mistakenly exaggerate the significance of this case. They say, for example, that the University of Maryland's In-State Policy at issue here is like that of most public colleges and universities in the United States, which, according to the *amici*, deny eligibility for in-state status to nonimmigrant aliens. Br. of Ala. *et al.* at 3, 8; Br. of Am. Coun. on Educ. *et al.* at 3-4. They assert further that if the decisions below are allowed to stand, large numbers of nonimmigrants, including those on foreign-student visas and other temporary visitors, will be permitted to qualify for in-state benefits, at a great financial cost to the state-supported schools. Br. of Ala. *et al.* at 3, 10; Br. of Am. Coun. on Educ. *et al.* at 6. The *amici* even go so far as to state that the decisions below strike at "the very rationale for the in-state/out-of-state distinction" (Br. of Ala. *et al.* at 3) and "may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all" (Br. of Am. Coun. on Educ. *et al.* at 7; see also *id.* at 8).

These statements are untrue and misleading. The decisions below will have no such drastic impact. As shown in our brief in opposition, the decisions below struck down the University of Maryland's In-State Policy only as it applies to the holders of G-4 visas; and the rationale of those decisions affects only the G-4 visaholders and those few other similar categories of nonimmigrant visaholders who, under the principles of this Court's decision in *Elkins* v. *Moreno*, 435 U.S. 647, 663-68 (1978) (App. 119a-124a), are capable of establishing domicile in the United States and in Maryland. Those decisions do not affect the great majority of nonimmigrant visaholders, such as foreign-student visaholders and temporary foreign visitors, who are precluded by federal law from establishing domicile in the Unitel States, as this Court held in *Elkins*. 435 U.S. at 665-66 (App. 121a-122a). Those nonimmigrant visaholders could not qualify for in-state status even if they were subject to the same test (domicile) applicable to citizens and immigrant visaholders.

The *amici* assert that the concept of domicile will not so limit the numbers of nonimmigrants who can qualify for in-state status, since the lower courts "are divided on the question of whether individual categories of nonimmigrants can acquire a domicile in the United States." Br. of Ala. *et al.* at 10; see also Br. of Am. Educ. *et al.* at 6. That claim is erroneous. This Court held in *Elkins* that "Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." 435 U.S. at 665 (App. 121a). It listed, as examples, the holders of the following nonimmigrant visas: B (temporary visitors), F (foreign students), C (aliens in immediate and continuous transit), D (vessel crewmen landing temporarily), and H (temporary workers). *Id.* On the other hand, the Court noted, "Congress did *not* restrict every nonimmigrant class" and in particular placed no such restrictions on

intent on G-4 visaholders. 435 U.S. at 666 (App. 122a).[1] Thus, the Court held, Congress "was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile." *Id.* This Court, then, has given explicit guidance on the question whether various categories of nonimmigrant visaholders can be domiciled in the United States. We are aware of no subsequent split in authority among the lower courts as to which categories of nonimmigrant visaholders can be domiciled in the United States, and the *amici* do not demonstrate any.[2] In view of these circumstances, it seems clear, contrary to the *amici*'s claims, that only a small number of nonimmigrant aliens are affected by the decisions of the courts below.

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[1] Other unrestricted nonimmigrant categories include E (aliens admitted under certain treaties of commerce) and I (certain foreign media representatives).

[2] Of the cases cited by *amici* (see Br. of Ala. *et al.* at 10), only one, *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979), postdates the *Elkins* decision. The issue in that case was the proper construction of 8 U.S.C. § 1182(c), which provides for the waiver of exclusion provisions for certain aliens returning to "lawful unrelinquished domicile of seven consecutive years." The petitioner attempted to make that showing even though his first lawful entry to the country was within seven years. While the court accepted the INS position that the seven consecutive years of "lawful unrelinquished domicile" must, under § 1182(c), follow the granting of a permanent resident visa, the case does not address which categories of aliens can establish domicile under the law of the United States or individual States for general purposes. Furthermore, the language quoted by Alabama *et al.* (at 10)—"The INS maintains that an alien cannot be lawfully domiciled in this country unless 'lawfully admitted for permanent residence'"—stated the INS's position with respect to the issue in that case, not as a general matter, as is made clear by a later statement: "The INS concedes that a small group of nonimmigrants including diplomats, foreign government representatives and their retinues, treaty traders, and media representatives, are not required to maintain a foreign residence, and may be here for other than temporary purposes," citing 8 U.S.C. § 1101(a)(15)(A), -(E), -(G), and -(I). 601 F.2d at 464 & n.12.

For similar reasons, and again contrary to the assertions of the *amici*, the lower courts' decisions will not have any great impact on the in-state policies of most public colleges and universities. We have not had time (nor do we believe it necessary or appropriate) to attempt a complete survey of all state-supported colleges and universities since receiving the briefs of the *amici*. We have, however, obtained copies of the policies of several such universities in the States joining in the Brief of Alabama *et al.* Of these, the state universities in the two areas with major public international-organization headquarters (*i.e.*, the Washington, D.C., and New York City areas)—in which most, if not all, G-4 visaholders reside—have policies which do not specifically exclude nonimmigrant visaholders from in-state status, as does the University of Maryland. Either they simply base in-state status on domicile with no special provision or restriction dealing with aliens (the State University of New York and the state universities in Connecticut) or they specifically allow nonimmigrant visaholders who can show domicile in the State, such as G-4's, to obtain in-state status upon such a showing (the state universities in Virginia and Rutgers (the state university of New Jersey)).[3] Universities in other States are not

[3] The policies of these state universities are found in state statutes or in written policies of the University or, in the case of Virginia, in an opinion of the state attorney general's office. The relevant excerpts from these sources are included in Appendix A to this brief. In the case of the universities whose written in-state policies do not have a specific provision dealing with aliens, it is not entirely clear how they would treat a G-4 visaholder as a matter of unwritten practice. We were informed orally by officials of the State University of New York that in practice it excludes all nonimmigrant visaholders from in-state status. But it is not clear whether such an exclusion of a G-4 visaholder who could lawfully show domicile in New York would be appropriate under the University's written policy after the *Elkins* decision. In addition, we were informed orally that the general policy of the City University of New York is to require aliens to have an immigrant visa in order to obtain in-state status, but that nonimmigrant employees

likely to have many, if any, G-4 visaholders (and probably very few holders of the other nonimmigrant visas that allow domicile in the United States). Even so, we have found several state universities in such States which have policies that would appear to allow the holders of G-4 and similar visas that permit U.S. domicile to obtain in-state status if they can show that they are domiciled in the State. These include, for example, the University of Alabama, the state universities in Arizona, the state universities in Colorado, Indiana University, the University of Massachusetts, the state universities in North Carolina, the University of Rhode Island, and the state universities in South Carolina.[4]

Thus, the *amici* have grossly overstated the impact of this case on state universities and colleges, even in the *amici* States themselves. Their assertions that the decisions below strike at the very rationale of the in-state/out-of-state distinction and may force public universities to charge the same tuition rate to all are patently absurd in view of the limited arguments made and accepted by the courts in this case. The courts below sensibly and narrowly focused on the University of Maryland's policy of excluding G-4 visaholders from in-state status *even when they are domiciled in Maryland*, while granting such status to citizens and immigrant visaholders domiciled in Maryland; and they held that policy unconstitutional. An even-handed policy of basing in-state status on domicile, applicable to all, would cure the constitutional defect found in this case and would not have any substantial effect or impose any great cost on public universities.

2. *Errors of Amici Curiae Regarding the Merits of the Questions Presented.* In view of the limited nature

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of the United Nations (G-4 visaholders) can obtain a special form that will allow them to obtain in-state status at that university.

[4] The relevant excerpts from the state statutes or the universities' policies governing in-state status at these universities are included in Appendix B to this brief.

of the holdings below, the true interest of the *amici* does not appear to be with the University of Maryland's policy at issue here, but with broader matters. They want this Court, first, to use this case as a vehicle to overrule *Vlandis* v. *Kline*, 412 U.S. 441 (1973), and, second, to hold that the strict-scrutiny standard of equal protection analysis does not apply to discrimination by the States against nonimmigrant aliens. On the merits of these questions, however, the *amici*, like the University of Maryland, have presented no good reason for this Court to grant a writ of certiorari in the present case.

(a) *The due process issue.* The *amici* devote considerable efforts in their briefs to attempting to resurrect, as an important issue in this case, the question of the continued viability of *Vlandis*. They assert that the lower courts' application of *Vlandis* to the University's policy prior to June 23, 1978, erroneously made the outcome dependent on the rationale advanced for the policy, and that this case provides a good vehicle for this Court to overrule *Vlandis*. Br. of Ala. *et al.* at 6-8; Br. of Am. Coun. on Educ. *et al.* at 4-5. These contentions are without merit.

Throughout this litigation, until the Clarifying Resolution of June 23, 1978, the University consistently represented that its In-State Policy was based on the Maryland law of domicile and that the reason it denied in-state status to all nonimmigrant aliens was that, in its view, they could not be domiciled in Maryland under state law. While the University asserted cost equalization as an interest served by the policy, it did not claim that that concern was the basis or test for determining in-state status under the policy, and indeed made clear that it was not. See *Elkins* v. *Moreno*, *supra*, 435 U.S. at 656-57 n.5 (App. 112a-113a n.5). Rather, the University repeatedly made plain that the basis of the policy—*i.e.*, the intended test for in-state status under the policy—was domicile under Maryland law. See *id.*, 435 U.S. at 658-60 (App. 114a-116a). Thus, it is not sur-

prising that the plaintiffs argued, and the courts held, that that policy created an irrebuttable presumption of domicile that was not universally true for G-4 visaholders and thus denied them due process of law under *Vlandis*. In *Elkins*, this Court confirmed that "this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi* [422 U.S. 749, 771 (1975)] to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'" 435 U.S. at 660 (App. 116a). As shown in our brief in opposition (at 23-24), this Court's decision in *Toll* v. *Moreno*, 441 U.S. 458 (1979), did not decide to the contrary; and on remand the lower courts reaffirmed the applicability of *Vlandis* to the University's policy prior to the Clarifying Resolution. In our view, that application of *Vlandis*, as limited in accordance with this Court's statement in *Elkins*, was appropriate and led to a proper result.

In any event, the *Vlandis* issue is no longer an important issue in this case. The University's policy was held invalid on equal protection and Supremacy Clause grounds for the entire period both before and after the Clarifying Resolution, and the due process holding simply provided an alternative ground limited to the two-year period from July 13, 1976, to June 23, 1978. In these circumstances, there is not the least reason for this Court to reconsider the due process issue, which relates only to the pre-1978 phase of this case.

(b) *The equal protection issue.* The *amici* have similarly presented no good reason for this Court to review the unanimous holding of the courts below on the equal protection issue. They claim that this Court should not let stand a decision applying strict scrutiny to a subclass of nonimmigrant aliens, even though they may be domiciled in the State. The reason given is that nonimmigrants do not contribute much to the State's income tax revenues. Br. of Ala. *et al.* at 9-10; Br. of Am. Coun.

on Educ. *et al.* at 5. This argument, too, is exaggerated and without merit.

As noted above, this case does not involve nonimmigrant aliens generally, but only those G-4 and similar visa-holders domiciled in the United States and in Maryland. They are the only ones harmed by the University's policy at issue here. It is true that G-4 visaholders are, by virtue of international agreements and federal statute, exempt from paying income taxes on their salaries from the international organizations employing them.[5] But they are subject to all other taxes, including federal, state, and local income taxes on any other income.[6]

In any event, the fact that G-4 aliens are exempt from income taxes on their salaries from the international organizations is no reason either to lower the equal protection standard applicable to them or to justify the University's discrimination against them under a strict-scrutiny standard. Nonpayment of certain taxes—

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[5] As noted in our brief in opposition (at 14 n.4), this tax exemption was adopted for the benefit of the international organizations and their member nations and cannot be waived by individual employees.

[6] The *amici* claim that all nonimmigrants are exempt from income tax on their worldwide income, citing 26 U.S.C. § 872. Br. of Ala. *et al.* at 9; Br. of Amer. Coun. on Educ. *et al.* at 5. That statement is flatly erroneous. Section 872 of the Code excludes non-U.S.-source income from the gross income of a "nonresident alien individual" for tax purposes. But a "nonresident alien individual" for such purposes is not equivalent to the holder of a nonimmigrant visa. Under Internal Revenue regulations defining "residence," a G-4 visaholder can be a resident alien for income tax purposes. 26 C.F.R. § 1.871-2. See *Escobar* v. *Commissioner*, 68 T.C. 304 (1977). See also Rev. Rul. 80-363, 1980-2 C.B. 249. In fact, it is clear that a G-4 visaholder who is domiciled in the United States and whose usual place of abode is in the United States is a resident for federal income tax purposes. Similarly, for state tax purposes, a G-4 visaholder who is domiciled in the State or otherwise resides in the State for the prescribed period is subject to state income tax except on his exempt salary. See, *e.g.*, Md. Ann. Code, Art. 81, § 279(i) (1980).

or, more precisely, an exemption from certain taxes, established by international agreement or federal statute and not waivable by the recipient—has never been a reason to apply a different standard of review for equal protection purposes. The reason that this Court has found classifications based on alienage to be suspect and subject to strict scrutiny is that aliens constitute a " 'discrete and insular' minority" for whom "heightened judicial solicitude is appropriate . . . ." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). This Court has further made clear that even a subclass of aliens is entitled to this protection so long as the enactment discriminating against them is directed at aliens and harms only aliens (as does the University's classification at issue here). *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). This analysis is not limited to immigrant aliens. In fact, nonimmigrant aliens are at least as "discrete and insular" a minority in need of "heightened judicial solicitude" as are other aliens.[7] Thus, it is clear that the courts below properly applied strict scrutiny to judge the constitutional validity of the University's discrimination against G-4 visaholders.

Moreover, the G-4 visaholders' partial income tax exemption is insufficient to justify the University's discrimination against them under a strict-scrutiny standard. The University properly conceded below that its policy cannot withstand that exacting test (see App. 41a n.14) and apparently continues to do so since it makes no effort whatever in its petition to justify the policy under the strict-scrutiny standard.[8] Thus, that question is not presented here.

---

[7] As noted in our brief in opposition (at 13), the references in *Graham* and *Nyquist* cited in the Brief of Alabama *et al.* (at 10) were made in the context of determining whether the enactments in question could survive strict scrutiny, not whether strict scrutiny applied.

[8] Under that standard, the State must show not only that its interest is substantial, but that the classification is precisely drawn

CONCLUSION

For these reasons and the reasons stated in our brief in opposition, the petition for writ of certiorari should be denied.

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and precisely tailored to serve that interest. *E.g., Sugarman* v. *Dougall*, 413 U.S. 634, 643 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). The University's concession that its exclusion of G-4 and similar visaholders domiciled in Maryland from in-state status cannot meet that standard is clearly correct. It makes no effort to classify citizens and immigrant aliens domiciled in Maryland on the basis of their tax liability or payments. It allows such a citizen or immigrant domiciled in the State to obtain in-state status regardless of whether—and the extent to which—he pays state income taxes and regardless of whether he has contributed little, if anything, to the State's income tax revenues. The University further admitted below that an *immigrant* visaholder employed by a public international organization could obtain in-state status upon a showing of Maryland domicile even though his salary would likewise be exempt from state income tax. See *Elkins* v. *Moreno*, *supra*, 435 U.S. at 656-57 n.5 (App. 112a-113a n.5). Thus, the University's classification at issue here is not drawn with sufficient precision, in terms of the University's interest in cost equalization based on tax payments, to withstand the test of strict scrutiny.

APPENDICES

APPENDIX A

RELEVANT EXCERPTS FROM STATE STATUTES OR UNIVERSITIES' POLICIES GOVERNING RESIDENCY STATUS FOR TUITION PURPOSES AT STATE UNIVERSITIES IN CONNECTICUT, NEW JERSEY, NEW YORK, AND VIRGINIA

Connecticut

Conn. Gen. Stat. Ann. §§ 10-329d, 10-329e (West 1977):

"§ 10-329d. Definitions

* * * *

"(3) 'Domicile' denotes a person's true, fixed and permanent home and place of habitation. It is the place where he intends to remain, and to which he expects to return when he leaves without intending to establish a new domicile elsewhere . . . ."

"§ 10-329e. Determination of student status

"The following shall determine the status of a student:

"(1) Every person having his domicile in this state shall be entitled to classification as an in-state student for tuition purposes. Except as otherwise provided in this part, no person having his domicile outside of this state shall be eligible for classification as an in-state student for tuition purposes;

"(2) The domicile of an unemancipated person is that of his parent;

"(3) Upon moving to this state, an emancipated person employed full-time who provides evidence of domicile may apply for in-state classification for his spouse and unemancipated children after six consecutive months of residency . . . ."

[This statute contains no provision specifically restricting or dealing with aliens.]

New Jersey

Excerpt from Legal Residency Policy for Rutgers University, II. Factors Considered in Determining Residence for Tuition Assessment:

"D. *FOREIGN NATIONALS:*

"Alien nationals who are in the United States with resident immigrant visas or special refugee visas (being processed for permanent residency) will be considered the same as United States citizens for purposes of assessing tuition.

"However, any other non-immigrant alien will be classified as a non-resident for assessment of tuition *unless he/she demonstrates by affirmative proof that he/she has a domicile in New Jersey.*" (Emphasis added.)

New York

Excerpt from Administrative Policies, State University of New York, Establishment of Residence for Tuition Purposes, Item 010.1:

"1. *Resident Student Tuition*

"a. Payment of resident tuition depends upon the establishment of the 'domicile' of the student in New York State at the time of registration.

"One's domicile is that place where he maintains his permanent home and to which he always intends to return. Consequently, while a student may have any number of residences, he may have only one domicile."

[Other provisions follow, but none deals specifically with aliens.]

Virginia

Va. Code § 23-7 (1980) ("Who entitled to reduced tuition charges"):

* * * *

"B. Except as provided in § 23-7.2 [which is not relevant here], no person in attendance at a State institution of higher education shall be entitled to reduced tuition charges unless such person is and has been domiciled in Virginia for a period of at least one year immediately prior to the commencement of the term, semester or quarter for which any such reduced tuition charge is sought."

[Sec. 23-7 contains various other provisions, but none deals specifically with aliens.]

Excerpt from Memorandum from Paul J. Forch, Assistant Attorney General, to Presidents of State Institutions of Higher Education, December 16, 1980:

"In 1977, this Office published specific guidelines to assist institutions in the application of the domicile and durational requirement provided in § 23-7. In the case of aliens, the present guidelines provide as follows:

"*ALIENS*

"The fact that a person is not a citizen of the United States does not itself disqualify a person for in-state tuition. However, an alien must prove that he is domiciled in Virginia. Thus, he must satisfy the college that his ties are to Virginia as opposed to other states. If the student is in the United States on a temporary visa, which expires at some point in the future, he cannot be domiciled here, since he cannot have the intention to remain indefinitely. These types of visas, which expire at some point certain, are F, H, J and K visas. Applicants with these types of visas may be denied in-state tuition.

"Under existing guidelines, permanent resident immigrants are generally eligible for in-state tuition rates upon a showing of compliance with § 23-7.

Nonimmigrant aliens are also eligible if their visa does not require maintenance of a foreign residence which they may not abandon, or does not expire at some point certain. For example, A-1, A-2 and G-4 visaholders live in the United States indefinitely. . . ." (Emphasis added.)

APPENDIX B

RELEVANT EXCERPTS FROM STATE STATUTES OR UNIVERSITIES' POLICIES GOVERNING RESIDENCY STATUS FOR TUITION PURPOSES AT CERTAIN OTHER STATE UNIVERSITIES

Alabama

Excerpt from Resolution of The Board of Trustees of the University of Alabama, August 21, 1975:

> "A. . . . Classification of students as resident or non-resident will be determined by the following definitions and rules:
>
> * * * *
>
> "2. '*Residence*': For the purpose of this policy, a residence shall be that location with which a person is considered to have the most settled and permanent connection so that one would not have more than one residence. A residence is the place where a person is generally understood to reside and where that person does in fact reside with the intention of remaining there indefinitely and, during absences, of returning there. To initially establish a residence requires both an intent to remain at a place indefinitely within the meanings set out above and physical presence at that place. For purposes of this policy, *residence is generally intended to mean the same as domicile*, except where legal construction of that term conflicts with clear expressions to the contrary in this policy or the guidelines provided for herein." (Emphasis added.)

[The Resolution contains no provision dealing specifically with aliens.]

Excerpt from Memorandum to All International Students from Reva Bailey, Office of Admissions and Records, The University of Alabama in Huntsville, July 20, 1981:

"In most cases, determination of a student's residence status will be made based on information supplied to the University in the process of admission. International students who are in this country on a F-1 visa should be advised that under that classification it is not possible to qualify as an Alabama resident. Therefore, out-of-state fee rates will apply beginning this fall. *An international student whose visa is other than F-1* or who has been classified as a U.S. resident *should contact this office to request a review of your status under Alabama residency requirements.*" (Emphasis added.)

Arizona

Excerpt from Information and Guidelines for Determining Tuition Status, Arizona Board of Regents (Sec. 3.A—Aliens):

"A. A person who is not a citizen of the United States must meet the same requirements for establishing a domicile in Arizona as is required of a citizen. In addition, a non-citizen of the United States, if required to hold a visa, must hold a type of visa which permits establishment of an Arizona domicile."

Colorado

Colo. Rev. Stat. § 23-7-102 (1973):

"23-7-102. Definitions. As used in this article, unless the context otherwise requires:

* * * *

"(2) 'Domicile' means a person's true, fixed, and permanent home and place of habitation. It is the place where he intends to remain and to which he expects to return when he leaves without intending to establish a new domicile elsewhere.

* * * *

"(5) 'In-state student' means a student who has been domiciled in Colorado for one year or more imme-

diately preceding registration at any institution of higher education in Colorado for any term or session for which domiciliary classification is claimed . . . ."

[Sec. 23-7-103 contains various presumptions and rules for determination of in-state status, but none deals specifically with aliens.]

Indiana

Excerpt from Indiana University Rules Determining Resident and Nonresident Student Status for Indiana University Fee Purposes:

"3. The foreign citizenship of a person shall not be a factor in determining resident student status if such person has legal capacity to remain permanently in the United States."

Massachusetts

Excerpt from Rules and Regulations Governing the Residency Status of Students for Tuition Purposes, University of Massachusetts, § 3.3(d)(2):

"(d) Unless evidence to the contrary appears, it shall be presumed by the approving authority of the University that:

* * * *

"(2) A person who is not a citizen of the United States must meet the same requirements for establishing residency in Massachusetts as are required of a citizen. In addition, a non-citizen of the United States, if required to hold a visa, must hold the type of visa which permits establishment of Massachusetts residency. . . ."

North Carolina

N.C. Gen. Stat. § 116-143.1 (1978):

"§ 116-143-1. Provisions for determining resident status for tuition purposes.—(a) As defined under this section:

"(1) A 'legal resident' or 'resident' is a person who qualifies as a domiciliary of North Carolina; a 'nonresident' is a person who does not qualify as a domiciliary of North Carolina.

"(2) A 'resident for tuition purposes' is a person who qualifies for the in-State tuition rate; a 'nonresident for tuition purposes' is a person who does not qualify for the in-State tuition rate.

* * * *

"(b) To qualify as a resident for tuition purposes, a person must have established legal residence (domicile) in North Carolina and maintained that legal residence for at least 12 months immediately prior to his or her classification as a resident for tuition purposes. . . ."

[Various other provisions follow, but none deals specifically with aliens.]

Excerpt from Record of the University of North Carolina at Chapel Hill, June 1980, The Undergraduate Bulletin, 1980-81 Issue:

"Aliens. An alien holding a visa which will permit eventual permanent residence in the United States is subject to the same considerations with respect to determination of legal residence as a citizen. An alien abiding in the United States under a visa conditioned at least in part upon intent not to abandon a foreign domicile (B, F, H and J visas) cannot be classified as a resident. An alien holding a visa issued for a purpose which is so restricted as to be fundamentally incompatible with an assertion by the alien of bona fide intent to establish a legal residence (C and D visas) cannot be classified as a resident. . . ."

Rhode Island

Excerpt from Regulations Defining Resident and Non-Resident Students at the University of Rhode Island (Adopted by the Board of Regents for Education December 2, 1971, and revised May 22, 1980):

"1. For the purposes of determining a student's classification, the word 'residence' shall mean a student's domicile—the student's true, fixed and permanent home and place of habitation.

"2. A student who is a resident of the State of Rhode Island shall be classified as a 'Resident Student' and shall pay all general and other fees prescribed by the Board of Regents for Resident Students in public higher education.

"3. A student who is not a resident of the State of Rhode Island shall be classified as a 'Non-Resident Student' and shall pay all general and other fees prescribed by the Board of Regents for Non-Resident Students in public higher education."

[Various other provisions follow, but none deals specifically with aliens.]

South Carolina

S.C. Code §§ 59-112-10, 59-112-20 (1980 Cum. Supp):

"§ 59-112-10. Definitions

* * * *

"C. The word 'residence' or 'reside' shall mean continuous and permanent physical presence within this State, *provided*, that temporary absences for short periods of time shall not affect the establishment of a residence.

"D. The word 'domicile' shall mean a person's true, fixed, principal residence and place of habitation; it shall indicate the place where such person intends to

remain, and to which such person expects to return upon leaving without establishing a new domicile in another state. . . ."

* * * *

"§ 59-112-20. South Carolina domicile defined for purposes of rates and tuition fees.

"South Carolina domicile for tuition and fee purposes shall be established as follows in determinations of rates of tuitions and fees to be paid by students entering or attending State Institutions:

"A. Independent persons who reside in and have been domiciled in South Carolina for a period of no less than twelve months with an intention of making a permanent home therein, and their dependents, may be considered eligible for in-state rates.

"B. Independent persons who reside in and have been domiciled in South Carolina for fewer than twelve months but who have full-time employment in the State, and their dependents, may be considered eligible for in-state rates for as long as such independent person is employed on a full-time basis in the State.

* * * *

"D. The residence and domicile of a dependent minor shall be presumed to be that of the parent of such dependent minor."

[There are various other provisions of the state statute, but none deals specifically with aliens.]

Excerpt from letter to James Bieke of Shea & Gardner from Brenda S. Josey, Residency Officer, University of South Carolina, September 4, 1981:

"Pursuant to your request, I am sending a list of non-immigrant aliens which the University of South Carolina has determined are in a capacity to establish residency for purposes of paying in-state tuition.

"The attached list includes a list of the most common non-immigrant visas and under the status column it indicates whether the person is in a capacity to establish legal residency within an American state. If non-immigrant aliens are in a capacity to establish residency in the United States and they meet South Carolina statutory requirements for paying in-state tuition, they are permitted to pay the tuition and fees afforded to South Carolina residents.

Excerpt from attachment to above-cited letter:

"The following is a list of the categories of non-immigrant aliens and a statement of whether the statutes allow the parties to have the capacity to become in-state residents.

"CLASSIFICATION	DESCRIPTION	STATUS
*	* * *	
G-4	Officers and Employees of International Organizations (and their families)	Yes
*	* * *	

"

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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This brief is filed in response to the "Supplemental Brief for Respondents in Opposition," which purports to be authorized by Supreme Court Rule 22.6 as presenting to the Court "intervening matter[s] not available at the time of the party's last filing."[1] Unlike Respondents, the University of Maryland and its President, John S. Toll, do

[1] Filing of this Reply Brief is authorized by Rule 22.5.

not intend to use this brief as a device to reargue their case. Rather, they will focus on the students' unfounded assertion that this case lacks sufficient importance to warrant the issuance of a writ of certiorari.

ARGUMENT

THE SUBSTANTIAL IMPORTANCE OF THE ISSUES IN THIS PETITION IS EVIDENCED BY THE INTEREST OF AMICI, THE VIEWS OF COMMENTATORS AND THIS COURT'S PRIOR CONSIDERATION OF THE CASE.

Fourty-four states and the major national higher educational associations have asked this Court to review the decision of the Fourth Circuit upholding the invalidation of the University of Maryland's in-state tuition policy. Nevertheless, the student-respondents, apparently shocked by this genuine outpouring of interest, still desperately strive to minimize this concern by closing their eyes to most of the arguments made by Petitioners and Amici. They say the only issue is whether a single narrowly-defined subclass of nonimmigrants (G-4 aliens) can qualify for in-state benefits. And, thus, on the basis of a selective, self-contradictory and unscientific "survey" of only nine state universities, they inaccurately state that most public colleges and universities do not have an in-state policy that operates like that of the University of Maryland.

First, it is important to note that the assertion of Amici that most public colleges and universities effectively deny in-state benefits to nonimmigrants was not a new contention or, in the words of Rule 22.6, an "intervening matter." For at least four years, in practically every brief filed, including those in this Court, the University has compared its in-state policy to those of other institutions. In fact, four years ago, many of these same Amici made the same representation and the students voiced no disagreement.

The only evidence on the question below — an affidavit by a University director of undergraduate admissions which was uncontradicted — indicates that the University's policy conforms to that of the majority of public colleges and universitites. Appendix at 190, *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981).

Second, no one has ever contended that *all* public colleges and universities deny in-state status to G-4 aliens or nonimmigrants. Some states have joined as Amici in this case despite having policies that favor such classes. This does not brand their support as casual. Rather, it demonstrates how the constitutional issues in this case transcend the educational setting from which they arose. Contrary to Respondents' implications, the Amici in every respect do not share homogenous interests. Some joined as Amici out of concern over the dangers of the irrebuttable presumption doctrine. Others are obviously troubled by the lower court's broad extension of the "strict scrutiny" equal protection analysis to nonimmigrants and how this will impact on many state benefits and programs. There are those whose only interest is the case's impact on higher education. However, any one of these reasons is sufficient grounds to grant certiorari.

In fact, this Court obviously viewed this case as worthy of its attention the last time it was here. It is more so now because of the additional issues now in the case, particularly, the equal protection issue which has stirred the interest of commentators. *See, e.g.*, Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979); Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092 (1977); and Rosberg, The Protection of Aliens from

Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275.[3]

[3] Respondents' attempt to transform the equal protection issue to a narrow one must fail. First, the lower court struck down the University's policy as applied to *all* nonimmigrants, not just those domiciled in Maryland. Second, its rationale for so doing applies equally to *any* category of nonimmigrants. Third, their suggestion that *Elkins v. Moreno*, 435 U.S. 647 (1978), stands for the proposition that certain categories of nonimmigrants can never be domiciled in a state ignores the essence of this Court's holding in that case. The Court ultimately left it to state courts to determine whether state law precluded the establishment of domicile for the category of nonimmigrants in question. And, it would appear that most state courts do not consider nonimmigrants' visa restrictions as barring the establishment of domicile. *See* Annot., What Constitutes Residence or Domicile Within State by Citizens of Another Country for Purpose of Jurisdiction in Divorce, 51 ALR 3d 223, 233-235 (1973). Thus, as Amici observed, "[i]t is no answer to say that the elusive concept of domicile will limit the numbers of nonimmigrants who can qualify" for in-state tuition if the lower court's decision is allowed to stand. *Brief of Alabama, et al.*, at 10. Finally, even if the class at issue for equal protection purposes can be limited as Respondents contend, there would nevertheless be large numbers of nonimmigrants qualifying for the benefits. *See Supplemental Brief for Respondents in Opposition* at 2.

CONCLUSION

Petitioners contend that the issues in this case are important. They affect many educational institutions and will impact on the constitutionality of many other state classificatcns. For these reasons and those stated in the Petition for Certiorari, the University and its President request that review be granted.

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v.

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BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE

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No. 80-2178

In The Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, AND UNIVERSITY OF MARYLAND, PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE

INTERESTS OF AMICI

The interests of the amici curiae and our reasons for urging this Court to grant certiorari in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), are as follows:

The amici curiae are forty-four (44) sovereign States. Four years ago, many of us urged the Court to overturn the decision of the United States Court of Appeals for the Fourth Circuit in *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), and to put an end to the irrebuttable presumption doctrine embodied in *Vlandis v. Kline*, 412 U.S. 441 (1973). Although the Court was able to avoid overruling *Vlandis*, it did vacate the decision of the Fourth Circuit and again illustrated its reluctance to strike down State classifications by means of the irrebuttable presumption analysis. *Toll v. Moreno*, 441 U.S. 458 (1979). Indeed, circuit courts of appeal have read the Court's action in this case as one more indication that the irrebuttable presumption doctrine is moribund. *See, e.g., deLaurier v. San Diego Unified School District*, 588 F.2d 674, 683 n.16 (9th Cir. 1978), and *Trafelet v. Thompson*, 594 F.2d 623, 629 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979).

We are deeply concerned that the current decision in this case, because it is so completely at odds with the attitude of this Court and the views of every other circuit on irrebuttable presumptions, will breathe new life into that disfavored doctrine. The case has become synonymous with the question of the viability of irrebuttable presumption analysis. Thus, a denial of certiorari could be interpreted by lower courts as signaling a retreat from the Court's past distaste for the doctrine and an invitation to employ it as a tool to invalidate reasonable State statutes.

We also believe that this case is now an ideal vehicle for the Court to consider the overruling of *Vlandis v. Kline*. The Fourth Circuit's affirmance demonstrates the questionable theoretical foundation of a doctrine that invalidates a State's classification on the basis of a court's perception of its paramount as opposed to its secondary rationales, *contra, McGinnis v. Royster*, 410 U.S. 263, 276 (1973) ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordi-

nate."); and that can be avoided prospectively by the assertion of an alternative rationale for a policy. *But see McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

If the decision of the Fourth Circuit should stand, it will also have a deleterious effect on the rationally-based tuition policies of many public colleges and universities. In striking down the University of Maryland's policy of excluding nonimmigrant aliens from in-state benefits, the court of appeals has not only invalidated a line drawn by most public colleges and universities in the United States, but it has also called into question the very rationale for the in-state/out-of-state distinction, *viz.*, that those classes which contribute the least to the cost of a public higher education should not be subsidized in the same fashion as those classes which make full contributions. The district court's disparagement of this value is particularly troubling coming at a time when such institutions are strapped for necessary funds by budget cuts and an ailing economy.

Finally, we contend that the district court's mishandling of the equal protection issue warrants intervention by the Court. In holding unconstitutional the exclusion of nonimmigrant aliens from in-state benefits, the lower court improperly overextended the reach of suspect class equal protection analysis to a subclass of aliens bearing few of the burdens shared by citizens and permanent resident aliens. If the decisions below are allowed to stand, large numbers of nonimmigrant alien students who contribute little to the cost of a public education will be permitted to qualify for in-state benefits, with a resulting impact on the budgets of publicly-supported schools. Accordingly, we urge the Court to grant the petition for certiorari in this case.[1]

[1] We urge review of all issues pressed by the petitioners, but for the sake of brevity and economy we limit our arguments to the due process and equal protection clause questions.

ARGUMENT

REVIEW IS APPROPRIATE IN THIS CASE.

A.

APPLICATION OF THE IRREBUTTABLE PRESUMPTION DOCTRINE IS AT ODDS WITH DECISIONS OF THIS COURT AND THOSE OF THE OTHER CIRCUIT COURTS OF APPEALS AND DEMONSTRATES THE NEED FOR OVERRULING *VLANDIS V. KLINE*.

Just as *Vlandis v. Kline*, 412 U.S. 441 (1973), stands as the only recent instance in which this Court has invalidated a rationally-based State classification not affecting fundamental rights as an irrebuttable presumption, the decision of the Fourth Circuit in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), is alone among all the circuits as the last bastion for that now-disfavored doctrine.

Ever since *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), proclaimed the irrebuttable presumption analysis "a virtual engine of destruction for countless legislative judgments," this Court has declined every invitation to apply the doctrine to invalidate rationally-based classifications not affecting fundamental liberties or even to suggest its possible relevance to what might have formerly been considered applicable situations. *See Friedman v. Rogers*, 440 U.S. 1, 7 n.8 (1979); *Vance v. Bradley*, 440 U.S. 93 (1979); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex*, 430 U.S. 961 (1977) (*mem.*); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Knebel v. Hein*, 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

The courts of appeals have obviously become aware of the change in attitude by this Court toward irrebuttable presumptions and for the most part have pronounced the death-knell for the doctrine as an independent basis for invalidating governmental action. *See, e.g., Sakol v. Commissioner,* 574 F.2d 694, 698 n.10 (2d Cir.), *cert. denied,* 439 U.S. 859 (1978) (cases cited with approval in *Vlandis* are " 'plainly not good law today' "); *Malmed v. Thornburgh,* 621 F.2d 565, 575-76 (3d Cir. 1980) ("As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant 'Lochnerism,' *see Lochner v. New York,* 198 U.S. 45, . . . (1905), a concept that has been administered suitable last rites and mercifully interred.)";[2] *Trafelet v. Thompson,* 594 F.2d 623, 630 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (if classification is rationally related to legitimate state purpose and thus not violative of equal protection, it does not create an irrebuttable presumption); *deLaurier v. San Diego Unified School District,* 588 F.2d 674, 683 n.16 (9th Cir. 1978) (catalog of Supreme Court cases refusing to resurrect irrebuttable presumption analysis); *Martin v. Bergland,* 639 F.2d 647, 651 n.12 (10th Cir. 1981) ("For purposes of this case, we read *Usery* and *Salfi* as an indication that [the irrebuttable presumption] doctrine is moribund."). Even the Fourth Circuit, between its two summary affirmances in the present case, said:

> The doctrine of impermissible irrebuttable or conclusive presumption has been justly criticized as of doubtful constitutional antecedents and of limited application.

[2] Thus, the Third Circuit, noting "the confusion caused by the irrebuttable presumption doctrine," 621 F.2d at 576 n. 17, distinguished its 1977 decision in Gurmankin v. Costonzo, 556 F.2d 184 (3d Cir. 1977) — the only recent court of appeals decision to rely on *Vlandis* — as a case involving an irrational classification. 621 F.2d at 575.

Fairfax Hospital Association, Inc. v. Califano, 585 F.2d 602, 608 (4th Cir. 1978).[3]

Although the irrebuttable presumption analysis of *Vlandis* has apparently been abandoned by all of the federal appellate courts except the Court of Appeals for the Fourth Circuit, it is nevertheless apparent that without further action by this Court the doctrine will continue to be cited by those lower courts in need of an excuse to question the wisdom of a particular governmental policy. *See, e.g., Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978) (invalidating massage parlor regulation); *Molyneaux v. Pennsylvania Department of Public Welfare*, 403 A.2d 634 (Pa. Commonwealth Ct. 1979) (striking down welfare rule on the allocation of parental income to children). In addition to foreclosing this harmful side-effect of the existence of the irrebuttable presumption doctrine, review by this Court of the current decision is necessary to curtail further use of the chaotic methodology employed to strike down the University of Maryland's in-state policy. The district court conceded the rational basis for the University's exclusion of nonimmigrants from the in-state subsidy. *Moreno v. Toll*, 489 F. Supp. 658, 666 (D. Md. 1980). It also admitted that the cost-equalization rationale for the policy was present in the case from its inception. *Moreno v. Toll*, 480 F. Supp. 1116, 1123-24 (D. Md. 1979). *See also Moreno v. University of Maryland*, 420 F. Supp. 541, 560 (D. Md. 1976). Indeed, cost-equalization is the *raison d'etre* of any in-state policy. Nevertheless, because of its perception of the "overall goal" of the policy, 480 F. Supp. at 1124,[4] the district court proclaimed domicile the University's "paramount" concern from 1976 to 1978. Thus, it invalidated a

[3] Neither the district court nor the Fourth Circuit mentioned the *Fairfax Hospital* case, despite the petitioners' reliance on it.

[4] The lower court reached its overall decision on the goal of the policy on motion for summary judgment, expressly declining to resolve the question on the basis of references in the record.

rationally-based State policy by impermissibly picking and choosing between primary and secondary rationales for a governmental classification. *See McGinnis v. Royster*, 410 U.S. 263, 276 (1973) ("So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.").[5] Moreover, the decisions below, by finding an irrebuttable presumption in the University's in-state policy prior to 1978 but not after simply on the basis of a University resolution reaffirming interests asserted throughout the litigation, makes little sense. The resolution neither altered the terms of the in-state policy nor removed its exclusion of nonimmigrants from benefits. To draw a constitutional difference on the basis of such an assertion of interests reduces the irrebuttable presumption doctrine to a rule of pleading and practice. The lower courts are in effect saying that a State should assure that there is more than one rationale for its policy and plead all possible rationales early in the litigation, or risk the finding of an irrebuttable presumption. Whatever one thinks of such a requirement as a rule of pleading and practice, this Court has never before forced a litigative strategy on the State as the price for constitutional immunity.[6]

[5] Review of the Fourth Circuit's decision affords this Court an appropriate vehicle to resolve the apparent tension between language in Elkins v. Moreno, 435 U.S. 647, 660 (1978) (if University makes domicile "the 'paramount' policy consideration," but refuses to allow students to meet that test, the case is governed by *Vlandis* as limited by *Salfi*), on one hand; and McGinnis v. Royster, 410 U.S. 263, 276 (1973) ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate."), and Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 490 n.18 (1977) (if policy is designed to serve anything more than a single purpose, implication of an irrebuttable presumption fails), on the other.

[6] In addition, it is hard to believe that the Constitution should punish the University of Maryland simply because it may have erroneously construed the Maryland law of domicile, particularly when its in-state policy is otherwise rationally based.

There may indeed be ways for this Court to reverse the decision without overruling *Vlandis*;[7] however, it is hard to imagine a case better than the present one to demonstrate the intellectual failings of the irrebuttable presumption doctrine. For this reason, we urge the Court to grant certiorari to review and set aside the decision of the Fourth Circuit and, in so doing, to overrule *Vlandis v. Kline*.

B.

APPLICATION OF SUSPECT CLASS EQUAL PROTECTION ANALYSIS TO A RATIONALLY BASED POLICY OF EXCLUDING NONIMMIGRANT ALIENS FROM IN-STATE TUITION SUBSIDIES CONFLICTS WITH DECISIONS OF THIS COURT AND, IF ALLOWED TO STAND, WOULD RESULT IN FINANCIAL HARDSHIP FOR MANY PUBLIC COLLEGES AND UNIVERSITIES.

Most public colleges and universities in the United States confer eligibility for in-state benefits on citizens and permanent resident aliens but deny such preferential treatment to nonimmigrant aliens. Because of the large numbers of resident aliens who qualify, such a policy cannot be laid to an anti-alien animus. Rather, it has its basis in the recognition of the very real differences that exist between nonimmigrants and citizens and permanent resident aliens (immigrants), most importantly, with respect to the burdens shared and the contributions made by each class.

As one scholar has noted:

> Immigrant aliens are admitted to the United States with the expectation that they will remain here indefinitely and will

[7] The petitioners have contended that this Court's decision in Toll v. Moreno, 441 U.S. 458 (1979), should have removed the irrebuttable presumption issue from the case. In addition, if the University is successful in winning reversal on equal protection grounds, this Court could reject any implication of an irrebuttable presumption on the basis of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 24 (1976) (regulation in terms of an irrebuttable presumption not invalidated "when its operation and effect are clearly permissible").

> eventually become citizens. Nonimmigrants, by contrast, cannot have an intention of remaining here indefinitely, since they are admitted for a limited purpose and for a limited period of time. They do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the state. It may be perfectly rational to deny them benefits that are made available to the State's permanent residents.

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. One of the burdens shared by citizens and permanent resident aliens and avoided by nonimmigrants generally is full contribution by way of tax dollars to State programs and services such as the cost of a public higher education.

It is the State's income tax that is the primary source of revenue for the operation of the University of Maryland.[8] Yet many nonimmigrants are not in the United States long enough to contribute much, if anything, to State income tax revenues. Other nonimmigrants, such as the parents of the respondents, are exempt from paying income tax on most of their income — their salaries as employees of the World Bank and the Inter-American Development Bank. Finally, *all* nonimmigrant aliens are spared the income tax placed on citizens and resident aliens, *viz.*, taxation of their worldwide income. *See* I.R.C. § 872 & Md. Ann. Code art. 81, § 280(g) (1980).

[8] The district court erroneously emphasized the possible payment of other kinds of taxes, such as property tax, by G-4 aliens in suggesting that nonimmigrants may make sufficient tax contributions to the operation of the University of Maryland. 489 F. Supp. at 666. However, in the main, it is the income tax that supports the University. As in most States, property taxes do not pay for the cost of a public higher education in Maryland. *See* Md. Ann. Code art. 31, § 20 (Cum. Supp. 1980) (State property tax); 62 Op. Md. Atty. Gen. 338 (1977) (local property tax).

In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), the Court said that a State could not rely upon a justification of limiting expenditures with respect to "tax revenues to which aliens have contributed on an equal basis with the residents of the State." Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not discriminate against resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." The converse of these propositions is true — where an alien subclass has not contributed on an equal basis to tax revenues and does not pay its full share of taxes that support educational programs, justifications of limiting expenditures and equalizing the costs of education with respect to tax contributions are constitutionally permissible interests.

The failure of the lower courts to recognize this rationale of *Graham* and *Mauclet* can only result in financial hardship for many public colleges and universities. If the court of appeals' decision is allowed to stand, large numbers of foreign students and other temporary foreign visitors may qualify for in-state benefits at a huge financial cost to State and local government. It is no answer to say that the elusive concept of domicile will limit the numbers of nonimmigrants who can qualify. Both the federal circuits and state courts are divided on the question of whether individual categories of nonimmigrants can acquire a domicile in the United States. *Compare Lok v. INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."), *with Castillo-Felix v. INS*, 601 F.2d 459, 462-63 (9th Cir. 1979) ("The INS maintains that an alien cannot be lawfully domiciled in this country unless 'lawfully admitted for permanent residence.' "). *Compare also Seren v. Douglas*, 489 P.2d 601 (Colo. App. 1971), *with Taubenfeld v. Taubenfeld*, 93 N.Y.S.2d 757 (App. Div. 1949).

For these additional reasons, we urge that again granting certiorari is appropriate in this case.[9]

CONCLUSION

Review by this Court is essential to remedy an erroneous decision that will increase costs to States and their institutions of higher education, to correct the lower court's fundamental misreading of constitutional law, and to prevent courts from applying incorrect and disfavored analysis to invalidate legitimate State classifications in the future.

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[9] The procedural course of this case bears a striking similarity to Knebel v. Hein, 429 U.S. 288 (1977). There a three-judge court held Iowa food stamp regulations inconsistent with Department of Agriculture regulations. Hein v. Burns, 371 F. Supp. 1091 (S.D. Iowa 1974). While the State's appeal was pending in this Court, the Secretary of Agriculture promulgated a "clarifying amendment" to the federal regulations eliminating the basis of the district court's decision. As in the present case, this Court vacated and remanded. Burns v. Hein, 419 U.S. 989 (1974). On remand, the district court again held the regulations invalid. Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975). When a second appeal was taken, this Court reversed.

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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
PETITIONERS,
V.
JUAN CARLOS MORENO, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES AS *AMICI CURIAE*

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AUGUST, 1981

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v.

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MOTION OF THE AMERICAN COUNCIL ON EDUCATION, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Council on Education (ACE), the National Association of State Universities and Land-Grant Colleges

(NASULGC), the American Association of State Colleges and Universities (AASCU), and the American Association of Community and Junior Colleges (AACJC), by their undersigned attorney, move pursuant to Rules 36.1 and 42 for leave of Court to file a brief as *amici curiae* in the above-referenced case. In support of this motion, we state:

1. ACE, NASULGC, AASCU, and AACJC are nonprofit membership associations organized under the laws of and located in the District of Columbia.

2. Founded in 1918, ACE is a voluntary membership organization composed of 1380 nonprofit institutions of higher education and 177 educational associations and organizations. NASULGC's 140 member institutions are among the largest colleges, universities, and complex multi-campus systems in public higher education in the nation. Established in 1961, AASCU represents 345 State-assisted four-year colleges and universities and enrolls one-third of the nation's baccalaureate students. AACJC is a nonprofit corporation with a membership of over 900 of the country's community and junior colleges, including both publicly and independently-supported institutions.

3. ACE is the nation's major coordinating body in postsecondary education. NASULGC's mission is to promote the contributions that State and land-grant institutions make to postsecondary education through teaching, research and extension programs. AASCU is the mechanism through which State colleges and universities work collectively to formulate policy. AACJC's purpose is to provide national leadership in support of community-based higher education. As organizations whose members include the overwhelming majority of two and four-year publicly-supported colleges and universities, we are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

4. At this time of drastic budget-cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective postsecondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public postsecondary institutions in the United States.

5. After certiorari was granted in this case in 1977 on a single constitutional question (the continued validity of *Vlandis* v. *Kline*, 412 U.S. 441 (1973)), ACE and 28 States joined as *amici curiae* in support of the University of Maryland in urging that *Vlandis* be overruled. In its current posture, this case presents not only the constitutional question the Court did not answer when it last considered the case, but also three other constitutional issues that are of great concern to the national higher education community. As *amici curiae* comprising the principal associations of colleges and universities in the United States, we are able to offer a special perspective on the importance of these constitutional issues being decided by this Court, and on their proper resolution.

6. Although the parties consented to ACE appearing as an *amicus curiae* when the case was previously before the Court, both on petition for certiorari and the merits, the respondents' counsel has now refused consent, implying that the Court might attach undue importance to the case if consent were granted. Nevertheless, as evidenced by the present motion on behalf of ACE and the other leading associations of colleges and universities, as well as by the current *amici curiae* brief of over forty States, this case raises issues of transcendent

importance. They are issues to which we urge we are especially qualified to speak.

7. The written consent of counsel for the petitioners to our filing a brief as *amici curiae* has been lodged with the Clerk of the Court.

Wherefore, we urge that the Court grant this motion for leave to file the accompanying brief as *amici curiae* in this case.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1980

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BRIEF OF
THE AMERICAN COUNCIL ON EDUCATION,
THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES,
THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES,
AND
THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES
AS *AMICI CURIAE*

INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are the principal associations of colleges and universities in the United States. Our member institutions comprise the overwhelming majority of publicly-supported colleges and universities in the nation.

The American Council on Education, founded in 1918, is the nation's largest association of colleges and universities. Its membership includes 1,380 institutions of higher education, 177 national and regional associations, and 61 affiliated institutions and organizations concerned with higher education in the United States. The Council, through voluntary and cooperative action, seeks to provide comprehensive leadership for improving educational standards, policies, and procedures.

The National Association of State Universities and Land-Grant Colleges is an organization representing public institutions that are among the largest colleges, universities, and complex multi-campus systems of higher education in the United States. Its 140 member institutions include land-grant colleges and universities, state universities, urban universities, and major campuses of multi-campus universities. The sector of higher education represented by the Association grants 38% of all degrees awarded in the United States, including 36% of all bachelors, 39% of all first professional, 42% of all masters, and 64% of all doctorate degrees.

The American Association of State Colleges and Universities is an organization consisting of 345 member colleges and universities and their presidents or chancellors together with 34 associate members who are chancellors, executive directors, or heads of boards of trustees of state college systems. It was organized in 1961, and its member institutions have a total enrollment in excess of 2,500,000.

The American Association of Community and Junior Colleges was organized in 1920. Its membership of more than 900 institutions comprises a majority of the country's community and junior colleges, including both publicly and independently supported institutions, which enroll almost 5,000,000 students.

As *amici curiae*, we write to demonstrate our vital concern for the fiscal integrity of public colleges and universities. At this time of drastic budget cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective post-secondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public post-secondary institutions in the United States.

ARGUMENT

THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S DECISION, UPHOLD THE UNIVERSITY OF MARYLAND'S IN-STATE POLICY, AND OVERRULE *VLANDIS* v. *KLINE*.

This case raises issues of great importance to public colleges and universities across the nation. The difference between in-state and out-of-state tuition and fees represents a vital source of income to these institutions, especially in this time of decreasing governmental resources to fund public higher education. Almost ten years ago, the additional income derived from out-of-state tuition and fees was estimated at $250 to $300 million annually for the 400 public colleges and universities belonging to the National Association of State Universities and Land-Grant Colleges and the American Association of State Colleges and Universities. Waugh, *Is OUt-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time, inflation, and an ailing economy have obviously heightened dependence on this important source of revenue.

The in-state policy of the University of Maryland, in common with the tuition policies of most public colleges and

universities, seeks to equalize educational costs by assigning in-state or out-of-state status (with appropriately differential tuition rates and fees) to its students. The University's method for achieving cost equalization is also like that of most public colleges and universities in the nation. Only United States citizens and permanent resident aliens are eligible for in-state status, *see, e.g. Kirk* v. *Board of Regents of University of California,* 273 Cal. App. 2d 430, 436 n. 5, 78 Cal. Rptr. 260, 263-64 n. 5 (1969), *appeal dismissed,* 396 U.S. 554 (1970), because as a class nonimmigrants, due to their limited stay in this country or their exemption from income taxation, do not make full contributions to the cost of public higher education as do citizens and permanent resident aliens who are domiciled in the State. Similarly, in the case of financially dependent students, their domicile is irrelevant. Instead, the University looks to the parent or spouse who "pays the freight" to see if this person is a citizen or permanent resident alien domiciled in the State who should be accorded preferential in-state status. When the Armed Forces of the United States assigns one of its members to attend the University for educational purposes, the University assumes the Treasury's ability to pay out-of-state tuition and fee differentials and does not inquire into the individual student's domicile. Finally, when financially independent students who are citizens or permanent resident aliens are involved, their domicile in the State is the key to in-state status because they are subject to the full range of State taxation, including the State income tax so vital to the University's continued existence.

The decision of the court of appeals, *Moreno* v. *University of Maryland,* 645 F.2d 217 (4th Cir. 1981), *aff'g Moreno* v. *Toll,* 489 F. Supp. 658 (D. Md. 1980), and *Moreno* v. *Toll,* 480 F. Supp. 1116 (D. Md. 1979), if allowed to stand, will cast doubt on the rational in-state policies of public colleges and universities in all parts of the country. Its reliance on *Vlandis* v. *Kline,* 412 U.S. 441 (1973), and the discredited irrebuttable presumption doctrine for the result is all the more alarming.

Weinberger v. *Salfi*, 422 U.S. 749, 772 (1975), recognized the danger of the *Vlandis* analysis, correctly terming it "a virtual engine of destruction for countless legislative judgments." On no occasion since has this Court employed the irrebuttable presumption doctrine to invalidate a rationally-based classification not implicating a fundamental right. Nevertheless, as the reliance on *Vlandis* below demonstrates, a clearer message is required. *Vlandis* v. *Kline* should be overruled.

Another disturbing characteristic of the Fourth Circuit's affirmance is its embracing the application of the suspect classification, strict scrutiny equal protection standard to nonimmigrant aliens. This strikes not only at the heart of most in-state policies but also conflicts with the complementary policy of the United States Department of Education, which denies nonimmigrants low interest federal, state, and private student loans. 45 C.F.R. § 177.201 (1980).

Nonimmigrants as a class do not support public higher education in the same measure as citizens and permanent resident aliens. As a group, the contributions of nonimmigrants to State income tax revenues are minimal compared to their citizen and permanent resident alien counterparts. Unlike citizens and permanent resident aliens, nonimmigrants are exempt from income taxation on their worldwide income. 26 U.S.C. § 872 (1976). More importantly, many nonimmigrants are exempt from federal and State taxation on their salaries from foreign governments and international organizations — their principal or exclusive sources of incomes — and most other nonimmigrants do not remain in the United States long enough to be significant contributors to the State income tax revenues that support public higher education.

For these reasons, nonimmigrant aliens should not have been accorded suspect class standing to invalidate rational in-state policies. Instead, rational basis analysis, applied in

Starns v. *Malkerson*, 326 F. Supp. 234, 239 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (*mem.*), to uphold the University of Minnesota's residency policy, should have been found equally applicable here to uphold the University of Maryland's in-state policy. As noted by Justice Rehnquist, dissenting from the certification of a question of State law in *Elkins* v. *Moreno*, 435 U.S. 647, 669, 675 (1978):

> [T]he University of Maryland's classification policy
>
> > "does not purport to speak in terms of the bona fides of [domicile] but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." Id., [*Weinberger* v. *Salfi*, 422 U.S. 749] at 772 [(1975)].

If allowed to stand, the decision of the court of appeals threatens to imperil the fiscal integrity of public colleges and universities by making in-state tuition rates and fees available to *all* nonimmigrants, including those on student visas. *See Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."). Until the present case, no court had ever suggested that the cost-equalization rationale for according differential in-state and out-of-state tuition rates and fees could be so simplistically and devastatingly subverted.

As *amici curiae,* we urge the Court to grant certiorari in this case to uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all, regardless of their contributions to the costs of higher education. This would deprive State income taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the State income tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy State residents might be precluded from any higher education because of the higher cost.

We also seek to preserve an open enrollment policy among publicly-supported colleges and universities in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition and fee differentials may eliminate this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis* v. *Kline,* 412 U.S. 441, 463 (1973) (Burger, C.J. dissenting).

Finally, we seek continuation of this Court's recognition of "[t]he State's objective of cost equalization." *Vlandis* v. *Kline,* 412 U.S. at 448. We urge the Court to facilitate this objective by upholding the right of publicly-supported institutions of higher education to classify students, including nonimmigrants, in ways reasonably calculated to achieve this goal.

CONCLUSION

As illustrated by this case, *Vlandis* v. *Kline* continues to be employed and rational in-state policies continue to be questioned. When discarded due process doctrines can be brought back to life and new equal protection analyses created to obscure the cost-equalization *raison d'etre* of in-state/out-of-state tuition and fee policies — and to imperil these policies in the process — it is time for this Court to act. For these reasons, we urge that a writ of certiorari issue in this case, that the Court reverse the judgments of the district court and court of appeals and uphold the University of Maryland's in-state policy, and that *Vlandis* v. *Kline* be overruled.

Respectfully submitted,

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AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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November 19, 1981

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QUESTIONS PRESENTED

1. Are nonimmigrant aliens a suspect class for whom strict scrutiny equal protection analysis should be applied to invalidate the rationally-based tuition and fee policies of public colleges and universities?

2. Does an automatic violation of the supremacy clause follow from a denial of equal protection to nonimmigrant aliens in the granting of "in-state" benefits?

3. Did the lower courts fail to give proper effect to *Toll v. Moreno*, 441 U.S. 458 (1979), and to other decisions of this Court when they concluded that the University of Maryland's policy created an irrebuttable presumption violative of due process until June 23, 1978?

4. Should *Vlandis v. Kline*, 412 U.S. 441 (1973), be overruled?

5. Is the eleventh amendment a bar to the retroactive tuition refunds that the lower courts ordered on the premise that they could reaffirm the district court's order of July 13, 1976, which this Court's decision in *Toll v. Moreno*, 441 U.S. 458 (1979), had effectively vacated?

PARTIES

The parties to the proceeding in the court of appeals were John S. Toll, President, University of Maryland, and the University of Maryland, as the appellants; and Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg, and Renee Otero, Jr., as the appellees.

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Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397 9

Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502 9

Articles of Agreement of the International Monetary Fund, Article IX, § 9(b), 60 Stat. 144 28

Income Tax Convention Between the United States and the United Kingdom, Article X, 60 Stat. 1383 28

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Maryland Annotated Code, Article 81, § 280(a) 27, 28

Federal Rule of Civil Procedure 60 12

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32 C.F.R. § 1611.2 (1978) 21, 27

45 C.F.R. § 177.201 (1980) 24, 27, 32

IRS Reg. § 1.893 28

Miscellaneous

1977 Annual Report: Immigration and Naturalization Service 5, 27

CCH Standard Federal Tax Reporter ¶ 4196.095 29

Comment, State Burdens on Resident Aliens: A New Preemption Analysis, 89 Yale L.J. 940 (1980) 23

Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess. (June 15, 1977) 23

Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979) 21

61 Opinions of the Attorney General of Maryland 840 (1976) 28

Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023 (1979) 23

Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 Mich. L. Rev. 1092 (1977) 5

Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275 .....5, 20, 21, 22, 26, 27

State of Maryland, Budget Message to the General Assembly and the Budget in Brief (Jan. 21, 1980) 29

No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), and

is reprinted in the appendix to the petition for writ of certiorari (P.A. 1a).[1] The opinions of the United States District Court for the District of Maryland that occasioned the appeal are reported as *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979), and *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980). (P.A. 11a and 29a).

This litigation has produced a number of additional opinions, including two of this Court. The first opinion of the district court is reported as *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), and is reprinted in the appendix to the petition for writ of certiorari (P.A. 55a). While the affirmance of this decision is reported as *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), the per curiam opinion of the court of appeals was not reported and is reprinted in the appendix to the petition for writ of certiorari (P.A. 101a). After granting certiorari, *Elkins v. Moreno*, 434 U.S. 888 (1977), this Court, after briefing and argument, issued its first opinion, *Elkins v. Moreno*, 435 U.S. 647 (1978) (P.A. 105a), certifying a question of state law to the Court of Appeals of Maryland. The opinion of the Maryland court is reported as *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (P.A. 137a). This Court's second opinion, reported as *Toll v. Moreno*, 441 U.S. 458 (1979) (P.A. 157a), vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case to the United States District Court for the District of Maryland for further consideration.

JURISDICTION

The jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1) (1976). The judgment of the court of appeals was entered on March 26, 1981. A petition for writ of certiorari

[1] References to the appendix to the petition for writ of certiorari are cited as "P.A." and references to the joint appendix as "J.A."

was filed on June 24, 1981, within the 90 day period provided by 28 U.S.C. § 2101 and Rule 20 of this Court, and was granted on October 5, 1981.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I, section 8. clause 4:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization.

Article VI, clause 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV, section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 8, section 1101(a)(15) (1976) is reprinted in the appendix to the petition for writ of certiorari. (P.A. 162a).

University of Maryland Policies

The policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes is reprinted in the appendix to the petition for writ of certiorari. (P.A. 167a).

A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens is reprinted in the appendix to the petition for writ of certiorari. (P.A. 172a).

STATEMENT OF THE CASE

A. The University's In-State Policy and Its Purposes

Most public institutions of higher education in the United States, including the University of Maryland, charge lower tuition rates and fees to "in-state" or "resident" students. For *eligible* classes of students, domicile is the key to in-state or resident status.[2] A number of groups of students, including citizens, however, are excluded without reference to their domicile. At the Uni-

[2] The in-state policy of the University of Maryland, reprinted in the appendix to the petition for writ of certiorari (P.A. 167a), lists a number of non-exclusive indicia of domicile that are used to determine a student's status. These include presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments. If the student is financially dependent on a parent or spouse, the status of the parent or spouse rather than of the student is looked to in making the determination.

versity of Maryland, for example, the in-state policy denies benefits to members of the Armed Forces who are assigned by the military to attend the institution for educational purposes. Also excluded are students who are financially dependent on parents or a spouse not domiciled in the State. The student's domicile is also ignored by the University of Maryland where nonimmigrant aliens are involved.[3] In a policy common to most public colleges and universities in the nation, the University's in-state rules provide that only United States citizens and "immigrant aliens lawfully admitted for permanent residence" are eligible for in-state benefits.[4]

[3] As defined by the immigration law, 8 U.S.C. § 1101(a)(15) (1976) (P.A. 162a.), there are twelve general categories of nonimmigrants: ambassadors and diplomats and their families (A-visa); temporary visitors for business or pleasure (B-visa); aliens in transit (C-visa); alien crewmen (D-visa); traders and investors (E-visa); foreign students (F-visa); officers and employees of and representatives to international organizations (G-visa); temporary workers (H-visa); foreign journalists (I-visa); exchange visitors (J-visa); fiancees or fiances of U.S. Citizens (K-visa); and intra-company transfers (L-visa).

Nonimmigrant aliens "do not share all the burdens that are imposed on residents of the country." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. They are not like resident aliens. Resident aliens, like citizens, "serve in the Armed Forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law [and] enter the United States with the intention of making this country their home." Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 Mich. L. Rev. 1092, 1110-11 (1977).

On the basis of alien address reports, as of January 1977, there were 58,035 permanent resident aliens and 8,391 nonimmigrants in Maryland. *1977 Annual Report: Immigration and Naturalization Service* at 108.

[4] The only evidence below, an affidavit of a University of Maryland admissions director (J.A. 53A-54A), attests to the fact that the University's policy as to nonimmigrants is in accord with that of most other public colleges and universities. Comprehensive surveys conducted by the staff of the University of Maryland and the Attorney General's office in 1976 and 1981,

By its terms and operation, the University of Maryland's in-state policy benefits many aliens. In the fall of 1979, for example, there were 1255 permanent resident aliens registered at the three principal undergraduate campuses of the University, and nearly 1000 of these were in-state students subject to lower tuition and fee rates. By contrast, only 493 nonimmigrants, classified as out-of-state students, were registered at that time (J.A. 52A-53A).

Before and throughout this litigation, a number of reasons surfaced in justification of the University's treatment of nonimmigrant aliens. For example, attached to the international bank students' district court complaint were a number of communications to them from University officials explaining the reasons for denying them in-state status (J.A. 15A-19A). Illustrative is this excerpt from a March 19, 1975, letter from then-University President Elkins, in which he concurred in the Intercampus Review Committee's decision to deny in-state status to respondents Moreno and Otero (J.A. 15A):

> It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as "out-of-state."

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as well as the participation of nearly all of the States of the Union as amici curiae in this case, indicate the widespread policy of excluding nonimmigrants fron in-state benefits.

> The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 nonimmigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification.[5]

See also letter from Judith L. Hirsch, corresponding secretary of the Intercampus Review Committee, dated February 24, 1975 (J.A. 16A); letter from Assistant Director of Admissions George E. Raley, Jr., dated April 3, 1975 (J.A. 17A); letter from President Wilson H. Elkins, dated May 14, 1975 (J.A. 18A). These documents, submitted by the international bank students, are the only ones that evidence the purposes of the in-state policy prior to the filing of this action.[6]

[5] The second reason stated in President Elkins' letter, to the extent it suggests that G-4 aliens cannot be domiciled in Maryland under common law principles, has been found to be based on an erroneous view of federal and state law. Elkins v. Moreno, 435 U.S. 647 (1978); Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979). Nevertheless, the University has asserted the first interest, *i.e.*, cost equalization, in every brief filed in this case, including the brief submitted to this Court in 1977. Brief of Petitioner, Elkins v. Moreno, 435 U.S. 647 (1978), at 31-32. And, in 1976, the lower court itself expressly held that cost equalization as a rationale could *never* justify the in-state policy against a due process challenge, Moreno v. University of Maryland, 420 F. Supp. 541, 560 (D. Md. 1976), a position which the court implicitly reversed in 1979 when it held the policy valid on due process grounds after June 1978. Moreno v. Toll, 480 F. Supp. 1116, 1125 (D. Md. 1979).

[6] The in-state policy was approved by the Board of Regents of the University of Maryland on September 21, 1973. It was drafted following the decision in Vlandis v. Kline, 412 U.S. 441 (1973), and in light of the fact that in every major case where an in-state policy had been challenged on constitutional grounds, institutions had sought to justify it on cost-equalization grounds. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) *aff'd*, 401 U.S. 985 (1971) (*mem.*); Kirk v. Board of Regents of University

In June 1978, the Board of Regents of the University of Maryland, echoing language in the 1975 letters from University officials that has been emphasized in this case since at least 1976, issued a clarifying resolution declaring in pertinent part that the in-state policy (P.A. 173a-74a):

> insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:
>
> > (a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
> >
> > (b) achieving equalization between the affected classes of the expenses of providing educational services;
> >
> > (c) efficiently administering the University's in-state determination and appeals process; and
> >
> > (d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

The language of the policy was not altered by the clarifying resolution and the policy has never been amended. Similarly, neither its operation nor its effect on nonimmigrants has been changed. Before the June 1978 resolution, nonimmigrants were denied in-state benefits; the same has been true after the date of the resolution.

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of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970); Sturgis v. State of Washington, 368 F. Supp. 38 (W.D. Wash.), *aff'd*, 414 U.S. 1057 (1973) (*mem.*)

B. History of the Proceedings Prior to Remand

On May 27, 1975, three of the named respondents, nonimmigrant aliens holding G-4 visas[7] and children of employees of certain international banks based in Washington, D.C., who were then undergraduate students at the University of Maryland, brought a class action suit in the United States District Court for the District of Maryland against the University of Maryland and its then-President, Dr. Wilson H. Elkins (J.A. 6A). The respondents challenged the constitutionality of the University's policy of granting admission on a preferential basis and charging lower tuition and fees to in-state students. Alleging jurisdiction under 28 U.S.C. §§ 1343(3) & (4) (1976), the international bank students contended that by excluding nonimmigrants from in-state benefits, the policy created an irrebuttable presumption of nondomicile in violation of due process and denied them equal protection of the laws by discriminating against them because of their alienage.

On cross motions for summary judgment, the district court held on July 13, 1976, that the in-state policy as applied to G-4 aliens violated due process and enjoined its enforcement (P.A. 55a). *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976). The court did not decide

[7] G-4 aliens are a group of nonimmigrants comprised of "officers or employees of international organizations and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv)(1976). The respondents' fathers were employed by the Inter-American Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank). Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502, Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d)(1976); 26 U.S.C. § 893(a)(1976).

the students' equal protection claim or the contentions they raised in legal memoranda that the in-state policy interfered with the G-4's treaty tax exemption and constituted a regulation of immigration in violation of the supremacy clause (P.A. 89a). 420 F. Supp. at 560. On August 3, 1976, the court stayed the injunctive portions of its order on the condition that the University refund tuition and fee differentials to eligible G-4 students in the event the July 13, 1976, order "were finally affirmed on appeal" (P.A. 100a).

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on April 27, 1977, in a one-paragraph, unpublished per curiam opinion (P.A. 101a). *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977). The appellate court later stayed its mandate "on the same terms as the district court namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who timely filed requests for reclassification to 'in-state' status would receive a refund of excess fees paid during the pendency of the stay" (P.A. 103a-104a).

On October 11, 1977, this Court granted a petition for writ of certiorari to consider whether, in light of *Weinberger v. Salfi*, 422 U.S. 749 (1975), the University's policy created an irrebuttable presumption. *Elkins v. Moreno*, 434 U.S. 888 (1977). Following argument, the Court (with two dissents) sua sponte ordered certified to the Court of Appeals of Maryland the question of whether G-4 aliens can become Maryland domiciliaries (P.A. 105a, 118a, 124a-25a). *Elkins v. Moreno*, 435 U.S. 647, 662, 668-69 (1978). On February 21, 1979, the Maryland court held that G-4 aliens could be domiciled in Maryland under

common law principles (P.A. 137a, 156a). *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979).[8]

Eight months before the latter decision, on June 23, 1978, the Board of Regents of the University of Maryland had adopted, and transmitted to this Court and the Court of Appeals of Maryland, "A Resolution Clarifying the Purposes, Meaning, and Application of the [In-State] Policy Insofar As It Denies In-State Status to Nonimmigrant Aliens" (P.A. 172a). The clarifying resolution reaffirmed the in-state policy; reiterated its rational bases, including the principle that the costs of a public college or university education should be equalized between various classes in measure to their contributions to the State's economy; and asserted that these rationales were served regardless of whether the policy "conforms with the generally or otherwise applicable definition of domicile under the Maryland common law" (P.A. 174a).

On April 30, 1979, this Court issued its second opinion, which stated in relevant part:

> Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount" policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi*." . . . *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court.

[8] Dr. John S. Toll, who became President of the University of Maryland on July 1, 1978, was substituted as a party for Dr. Elkins while the case was pending before the Court of Appeals of Maryland.

> We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

(P.A. 157a, 160a) *Toll v. Moreno*, 441 U.S. 458, 461-62 (1979).

C. Proceedings After Remand

Subsequently, the district court, again utilizing irrebuttable presumption analysis, held on October 31, 1979, that the University's in-state policy violated due process before June 23, 1978. Nevertheless, the court ruled that the identical policy, applied the same way, with identical results, did not create an unconstitutional irrebuttable presumption after the date of the clarifying resolution (P.A. 11a, 27a-28a). *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (D. Md. 1979).[9] The court also concluded that the clarifying resolution, although it did not alter the language or operation of the in-state policy, was nevertheless a "change in that policy" that could not be given "retroactive effect" to deny the students their claim to refunds from the July 13, 1976, date of the court's initial order (P.A. 27a). *Moreno v. Toll*, 480 F. Supp. at 1124. The court requested proposed orders from counsel to effectuate these refunds, and the petitioners objected that a requirement of retroactive monetary relief would offend that eleventh amendment because the condition on which

[9] The district court reasoned that the Board of Regents' clarifying resolution took the policy out of the irrebuttable presumption mold because "[g]iven the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify" (P.A. 28a). 480 F. Supp. at 1125. In its first opinion, the district court implicitly rejected a similar argument by the University that its definition on domicile could differ from the common law applications of domicile in other contexts (R. 241-47).

possible refunds had been premised in the stay orders had not been fulfilled (J.A. 42A).

On April 17, 1980, the district court further held that the in-state policy discriminated against nonimmigrant aliens and interfered with Congress' exclusive control over immigration (P.A. 29a, 44a, 46a-47a). *Moreno v. Toll*, 489 F. Supp. 658, 667, 668 (D. Md. 1980).[10] After additional correspondence and a conference with counsel, in which the petitioners reiterated their objections to retroactive monetary relief (J.A. 66A), the court issued an order on May 30, 1980, declaring the in-state policy unconstitutional on due process grounds before June 23, 1978, and unconstitutional on equal protection and supremacy clause grounds before, on, and after June 23, 1978 (P.A. 48a). In an attempt to circumvent the eleventh amendment problem, the court purported to reaffirm its order of July 13, 1976. In addition, retroactive monetary relief was ordered for a four year period, even though the policy had been declared constitutional on due process grounds for the period after June 1978 and was not invalidated on other constitutional grounds until April 1980. Immediately thereafter, Dr. Toll appealed from this order granting an injunction and sought and obtained a stay of the court's order (P.A. 52a).[11]

On March 26, 1981, in a per curiam opinion, the United States Court of Appeals for the Fourth Circuit affirmed

[10] However, the district court expressly rejected the students' contention that the in-state policy interfered with the tax exemption provisions of the banks' international agreements (P.A. 44a). Toll v. Moreno, 489 F. Supp. at 667.

[11] Although the University of Maryland had been dismissed as a party to the case in 1976, the judgment was entered "AGAINST DEFENDANTS" (P.A. 51a). Subsequently, the district court entered an amended judgment in favor of the University and against Dr. Toll, but the appeal had already been docketed. For this reason, the petitioners joined in an amended notice of appeal (J.A. 87A). *See* Fed. R. Civ. P. 60(a).

the decision of the district court (P.A. 1a). *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981). The appellate court essentially adopted the opinion of the lower court on the due process, equal protection, and supremacy clause issues and affirmed for "reasons sufficiently stated in the opinion[s] of the district court" (P.A. 5a, 6a). 645 F.2d at 220.

Thus, the decisions below expressly held that a classification disadvantaging nonimmigrant aliens is based upon alienage, affects a "suspect class," and must therefore be justified by a compelling interest (P.A. 5a). 654 F.2d at 220. In so doing, these courts held that the term "resident alien" in decisions of this Court included nonimmigrants as well as immigrants (P.A. 36a-37a), 489 F. Supp. at 663, rather than only those aliens who "are obligated to pay their full share of taxes," *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), and who "may be called into the armed forces." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

The decisions below did not mention the overwhelming number of aliens who qualify under the University's policy. The lower courts found "immaterial" that an effect of the policy was to deny in-state status to large numbers of *citizens*, specifically, out-of-staters and certain military personnel (P.A. 39a). 489 F. Supp. at 664. They refused to rely upon language in *Foley v. Connelie*, 435 U.S. 291 (1978), indicating that strict judicial scrutiny is applicable only to alienage classifications denying "necessities of life," and instead concluded that *Nyquist v. Mauclet*, a decision involving a state educational scheme pointedly disadvantaging permanent resident aliens — rather that nonimmigrants — governed their inquiry.

Finally, the lower courts declined to follow the view of the only two members of this Court who had previously spoken on the question and concluded that *Mauclet* was

not controlling in this case (P.A. 131a-32a n.6), *Elkins v. Moreno*, 435 U.S. 647, 677 n.6 (opinion of Rehnquist, J., joined by Burger, C.J., dissenting from certification), denigrating their remarks as "merely dicta in a dissenting opinion" (P.A. 41a n.13). 489 F. Supp. at 665 n.13.[12] Thus, they applied strict scrutiny equal protection anaylsis to the in-state policy and concluded that none of the justifications for the policy furthered a compelling interest, although some were or might be permissible under a rational basis inquiry (P.A. 42a-43a). 489 F. Supp. at 666. In short, they rejected the University's rationale that a class which avoids substantial payment of income taxes — the major state tax source of funds to operate the University — should not be entitled to in-state tuition rates.

On the supremacy clause issue, the lower courts found that the in-state policy automatically violated the supremacy clause because the policy had failed to pass muster under strict scrutiny equal protection analysis. They concluded that the policy interfered with Congress' exclusive control over immigration solely because they had found invidious discrimination without compelling justification (P.A. 46a-47a). 489 F. Supp. at 667-68.

On the due process issue the decisions below held that this Court's decision in *Toll v. Moreno* had not removed the irrebuttable presumption issue from the case for the period before June 23, 1978, the date of the Board of Regents' clarifying resolution. Instead, the lower courts held that before that date the in-state policy conclusively and unconstitutionally presumed that aliens could not acquire domicile so as to qualify for in-state benefits. Without comment, the lower courts passed over the University's contentions that the district court itself had actually decided in July 1976 that the in-state policy could not be rationally justified on the basis of cost equalization

[12] The majority opinion in Elkins v. Moreno also suggested that *Mauclet* did not automatically control the result in this case (P.A. 114a). 435 U.S. at 658.

or administrative convenience (P.A. 88a), 420 F. Supp. at 560, in misreliance upon *Vlandis v. Kline*, 412 U.S. 441 (1973).

Specifically addressing the refund question, the court of appeals held that the University had waived its eleventh amendment immunity by agreeing to pay refunds as a condition for obtaining a stay of the district court's order in 1976.[13] The appellate court refused to take note of the express limitation on the University's liability contained in the stay order, that is, that the district court order be "finally affirmed on appeal," rather than be vacated as occurred as a result of this Court's action in *Toll v. Moreno*, 441 U.S. 458 (1979).

On April 15, 1981 (and again on May 11 and June 9), the court of appeals stayed the issuance of its mandate pending the University's filing of a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The lower courts erroneously concluded that the University of Maryland's in-state policy for tuition and charge differentials violated equal protection by discriminating against a suspect class of nonimmigrant aliens, contravened the supremacy clause by attempting to regulate immigration, and prior to June 23, 1978, constituted an impermissible, irrebuttable presumption violative of due process. Over the University's objection that a refund of tuition violated the eleventh amendment and was contrary to the terms of the stay order entered by the district court,

[13] The district court resolved the refund issue in a different fashion. It construed the June 1978 clarifying resolution of the Board of Regents as a retroactive substantive policy change that could not be given effect to deprive the international bank students of their supposedly vested rights to refunds (P.A. 26a-27a). 480 F. Supp. 1124-25.

the lower court erroneously ordered the University to pay refunds to the international bank students, retroactive to July 13, 1976.

EQUAL PROTECTION—
INAPPLICABILITY OF STRICT SCRUTINY

The reason "strict scrutiny" applies to certain state classifications disadvantaging the "suspect class" of resident aliens is because that class bears many of the same burdens of citizenship such as payment of the full spectrum of taxes and service in the armed forces. *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365, 376 (1971). Nonimmigrant aliens who do not bear such burdens are no "resident aliens." Particularly here, where in-state educational benefits, which are not a necessity of life, are made available to so many resident aliens and their denial to nonimmigrants is not inconsistent with any federal policy, the constitutionality of the University's in-state policy should be gauged under the "rational basis" equal protection standard. That policy is rationally based because it limits University expenditures by providing an in-state subsidy to those more likely to contribute to the economic well-being of the University and the State; equalizes the expenses of providing higher education between those who do and do not contribute to its cost by way of income tax revenues; and allows the University's in-state determination and appeals process to be administered efficiently.

SUPREMACY CLAUSE—
NO STATE REGULATION OF IMMIGRATION

A state policy does not constitute an impermissible attempt to regulate immigration if it disadvantages only nonimmigrants, rather than all aliens. This preemption doctrine has no application to the denial of a state benefit, like a tuition differential, which is not a necessity of life. Finally, where, as here, the state regulation is harmo-

nious with the federal scheme, a preemption challenge must fail. See *Foley v. Connelie*, 435 U.S. 291, 295 (1978); *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).

DUE PROCESS— NO IRREBUTTABLE PRESUMPTION

If the University's in-state policy has a rational basis under the equal protection clause, it does not constitute an irrebuttable presumption violative of due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976). Because the in-state policy is independently justified by rational bases other than mere administrative convenience, it is not invalid under *Vlandis v. Kline*, 412 U.S. 441, 451-52 & 456-59 (1973). *Toll v. Moreno*, 441 U.S. 458 (1979) removed the irrebuttable presumption issue from this case. Thus, the lower courts were not free to conclude that the University's in-state policy was invalid under the due process clause for any period of time. Finally, this Court's decisions have so undermined *Vlandis* that it should be formally overruled.

THE ELEVENTH AMENDMENT PROHIBITS RETROACTIVE TUITION REFUNDS

The district court's order of July 13, 1976, was effectively vacated by this Court's decision in *Toll*. A "reaffirmation" of that order four years later is prohibited by the eleventh amendment. To obtain a stay in the district court, the University consented to pay refunds only if the July 13, 1976, order was "finally affirmed on appeal" — a condition that can never occur in light of the decision in *Toll*.

ARGUMENT

I.

NONIMMIGRANT ALIENS ARE NOT A SUSPECT CLASS AND THE RATIONALLY-BASED DENIAL OF AN IN-STATE EDUCATIONAL SUBSIDY TO NONIMMIGRANTS DOES NOT TRIGGER STRICT SCRUTINY EQUAL PROTECTION ANALYSIS.

A. Inapplicability of Strict Scrutiny

Simply stated, the equal protection issue in this case is whether a state policy benefiting permanent resident aliens but disadvantaging nonimmigrant aliens in the receipt of an in-state educational subsidy that is not a necessity of life affects a "suspect class" and must be gauged by strict scrutiny rather than by a rational basis inquiry. The University has advanced only "rational bases" for the exclusion of nonimmigrants from in-state benefits, including the fact that as a general proposition members of the nonimmigrant class, either because of state income tax exemptions, other more favored state income tax treatment, or their limited stay in this country, do not make the same contribution to the cost of education at the University as citizens or permanent resident aliens. The lower courts effectively found that the University's in-state policy was rationally based, but insufficient to withstand the strict judicial scrutiny applicable to certain state classifications affecting aliens.

In every case in which this Court has applied the strict scrutiny standard of equal protection review to a state classification affecting aliens, the challenged statute or practice discriminated against permanent resident aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971). In addition, "[t]he Court has taken pains in each of the recent cases to make clear that the plaintiffs were

resident aliens, and in explaining why alienage classifications are suspect, it has referred pointedly to the position of resident aliens." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312 n.140. This has caused one scholar to note:

> The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens. It has not even suggested that such aliens are within the class protected under the suspect classification doctrine.

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the Government*, 1977 Sup. Ct. Rev. at 312.[14]

Indicative of the lower courts' misreading of this Court's alienage decisions is their attempt to incorporate nonimmigrants within the meaning of the term, "resident alien." Admittedly, that term can mean different things depending upon the context, but clearly in the context of this Court's equal protection cases a resident alien is a permanent resident alien, not a nonimmigrant. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that "[a]liens like citizens pay taxes and may be called into the armed forces. Unlike . . . short-term residents . . . aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." *See also In re Griffiths*, 413 U.S. 717, 722 (1973). Similarly, in *Mauclet*, the majority noted that "[r]esident aliens are obligated to pay their *full share* of the taxes that support the assistance programs." 432 U.S. at 12 (emphasis added). Most nonimmigrants do not live within the State for many years or contribute significantly to its

[14] Professor Rosberg has said that "one has an intuitive sense that the denial of benefits to nonimmigrant aliens rests on a real difference between their position, on the one hand, and the position of both resident aliens and citizens on the other." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312.

economy. Moreover, G-4 aliens, among other categories of nonimmigrants, are not subject to the full range of state taxes. Indeed, *all* nonimmigrants are treated differently than resident aliens for purposes of income taxation. Finally, nonimmigrants may not be drafted as long as they maintain their nonimmigrant status. 32 C.F.R. § 1611.2 (1980). Thus, it is clear that this Court has not been thinking of nonimmigrants when it has displayed its special solicitude for "resident aliens."[15] *See United States v. Tsuda Maru*, 479 F. Supp. 519, 521-22 (D. Alas. 1979), in which the court, after citing to a definition of "resident alien" that excluded nonimmigrants, cogently observed:

> The numerous cases which have struck down alienage classifications have all involved resident aliens. . . . These cases have often emphasized that resident aliens live in American communities, must obey our laws, pay taxes, serve in the armed forces, and have made significant contributions to our country. . . . It is the burdens which resident aliens bear along with citizens that make absolute bars to aliens qualifying for work and educational opportunities so irrational. Resident aliens are in many respects just like citizens, and classifications which disadvantage them will usually be subjected to strict judicial scrutiny. . . . The philosophical and legal support for the doctrine is completely absent when a case involves a non-resident alien.

[15] In fact, one commentator has drawn the following conclusion from the Court's prior handling of this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham*. The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069, 1083 (1979). *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. at 312.

See also Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Matter of Anwo*, Interim Decision #2604 at 5-6 (BIA 1977), *aff'd sub nom. Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (The lawful permanent resident "enjoys greater rights than the nonimmigrant alien and assumes commensurate responsibilities and duties"); *Wong v. Board to Trustees of California State Universities and Colleges*, 125 Cal. Rptr. 841. (Cal. App. 1975) (upholding the constitutionality of a California statute that denied in-state benefits to nonimmigrants).

Second, so many aliens are eligible for in-state status at the University that it is irrational to contend that the in-state policy denies its benefits on the basis of alienage. In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University than there were nonimmigrants, and most of the permanent resident aliens qualified for the greater in-state subsidy (J.A. 53A-54A). And on the basis of alien address reports, there were seven times as many permanent resident aliens in the State of Maryland as there were nonimmigrants. *See supra* at 5 n.3. *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 313 (A State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Third, in-state tuition and fees are not "necessities of life." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974). As noted by Chief Justice Burger for the majority in *Foley v. Connelie*, 435 U.S. 291, 295 (1978), all

of this Court's cases applying strict scrutiny to state alienage classifications have involved exclusions that "struck at the noncitizen's ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." A dollar differential, not a right to education, is at stake here, an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year.[16] Certainly no claim can be made that professional employees of the World Bank and the Inter-American Development Bank, with their generour array of salaries, fringe benefits (including the legal and other costs of this litigation) and dependency allowances (*see* Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess., at 46-47 (June 15, 1977)), are unable to pay the differential. More importantly, at least for employees at the World Bank, neither the students not their parents need to pay the differential at all, because the bank itself pays it in the form of a "tuition equalization subsidy."

Fourth, strict scrutiny is not applicable where, as here, it is unreasonable to impute to the Federal Government a policy against the University's in-state scheme and, in fact, the in-state policy is consistent with the purposes of federal immigration law.[17] Just like the University of

[16] Thus, the present case is vastly different than that presented in Nyquist v. Mauclet, 432 U.S. 1 (1977), where the resident alien scholarship applicants might legitimately make the claim that to deny them a scholarship was to deny them an education and where state law effectively proclaimed the right to a higher education a necessity of life.

[17] *See* Perry; *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1063-64 (1979) ("Some state alienage-based classifications are sustained and other struck down not really because all the former pass muster under a strict standard of review, whereas all the latter do not, but because only the former can be deemed consonant with implicit federal policy regarding aliens."). *See also* Comment, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 Yale L.J. 940, 959 (1980).

Maryland and other public colleges and universities across the nation, the Federal Government has drawn the line on various benefit schemes between nonimmigrants on one hand and citizens and permanent resident aliens on the other. *See, e.g.*, 42 U.S.C. § 1395(o) (1976) (Medicare benefits) (upheld in *Mathews v. Diaz*, 426 U.S. 67 (1976)); 45 C.F.R. § 177.201 (1980) (excluding nonimmigrant aliens from eligibility for federal, state, and private programs of low interest student loans).[18] This latter regulation makes it absolutely clear that the Federal Government has no policy in favor of according educational benefits to nonimmigrants — in fact, just the opposite. If anything, 45 C.F.R. § 177.201 reflects a purpose of the immigration laws to encourage a change of immigration status to permanent resident alien — a purpose with which the University's in-state policy is entirely consistent.

Finally, two members of this Court have already spoken to the applicable standard to gauge the classification at issue here. Justice Rehnquist, in a opinion joined by Chief Justice Burger, has said:

> Unlike the situation in *Nyquist* [v. Mauclet, 432 U.S. 1 (1977)], the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6 and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone

[18] In Mathews v. Diaz, 426 U.S. 67 (1976), this Court upheld the denial of Medicare benefits to nonimmigrants upon application of a rational basis equal protection standard. Although the holding in *Diaz* can be explained on the basis of the Federal Government's plenary control over immigration, the Court suggested in *dicta* that the reason state exclusion of aliens from benefits might not be justified is because the State invariably treated out-of-staters and aliens differently. 426 U.S. at 85. The University's in-state policy does not suffer from such a defect in that *both* out-of-staters and nonimmigrants are denied the benefit. *See supra* at 4-6.

> would seem sufficient to support the line drawn by the University. *See Starns v. Malkerson, supra* [401 U.S. 985 (1977)].

Elkins v. Moreno, 435 U.S. 647, 676 n.6 (1978) (opinion dissenting from certification of question of state law to the Court of Appeals of Maryland).

For all of these reasons, the University's in-state policy does not disadvantage a suspect class. As a result, it should be gauged under the rational basis equal protection standard.

B. Rational Bases for University's Policy

Under the rational basis equal protection test, it is the international bank students' burden to demonstrate that the University's in-state policy is wholly unrelated to a legitimate state end. *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961). If "the distinctions drawn have some basis in practical experience," *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966), the students' attack must fail. Finally, it makes no difference which of the rational bases is primary or subordinate. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973). And "it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). *See also Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976). In this case, the presumption of constitutionality which must be accorded the University's policy stands because the challenged classification, "judged by reference to characteristics typical of the affected classes," *Califano v. Jobst*, 434 U.S. 47, 55 (1977), has "some basis in practical experience."

As Professor Rosberg has observed:

> [Nonimmigrants] do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the state. *It may be perfectly rational to deny them benefits that are made available to the state's permanent residents.*

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. Ct. Rev. 275, 312, 313 (emphasis added).

The University's out-of-state treatment of nonimmigrants is rationally based because it serves legitimate state interests in limiting University expenditures by providing an in-state subsidy to those more likely to contribute to the economic well-being of the University and the State — equalizing the expenses of providing higher education between those who do and those who do not contribute to its cost by way of income tax revenues; and efficiently administering the University's in-state determination and appeals process. *See* Affidavit of Wayne Sigler, ¶7 (J.A. 54A).[19]

Integral to weighing the first two rationales is an understanding of the characteristics and income tax treatment of nonimmigrants and the manner in which the University of Maryland acquires the funds necessary to furnish an education for its students.

[19] If, contrary to the in-state policy and the holding of the lower courts, the class of nonimmigrants is redefined as the students urge to encompass those nonimmigrants who can or cannot be domiciled in Maryland, a fourth interest surfaces in support of the University's policy — the prevention of disparate and unequal treatment between classes of nonimmigrants. *See* Knebel v. Hein, 429 U.S. 228, 295 (1977). In short, the University would have a legitimate interest in not fashioning a costly special rule for some already privileged members of the affected class. *See* New York City Transit Authority v. Beazer, 440 U.S. 568, 590 (1979).

Much has already been said the general characteristics of nonimmigrants. Many, such as temporary visitors, are here only briefly.[20] Others are in this country for a limited time. G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. Ct. Rev. 275, 312. In either case, these categories of nonimmigrants could hardly be expected to be around long enough to contribute financially to the University or the State's economy.

As a class, nonimmigrants are denied certain rights accorded citizens and permanent resident aliens, *e.g.*, federal student loans and education benefits, 45 C.F.R. § 177.201. Conversely, they are relieved of many of the burdens and responsibilities shouldered by citizens and permanent resident aliens, *e.g.*, the possibility of required military service, 32 C.F.R. § 1611.2.[21]

Most importantly, all nonimmigrants are treated differently and, in fact, more advantageously than citizens and permanent resident aliens, with respect to federal and state income taxation. Under 26 U.S.C. § 872 and Md. Ann. Code art. 81, § 280(a) (which adopts federal tax law), many nonimmigrants are exempt from taxation on their worldwide income. Other categories and members of the class of nonimmigrants are expressly exempt from

[20] According to the *1977 Annual Report: Immigration and Naturalization Service*, 8,036,916 nonimmigrants were admitted to the United States in fiscal 1977; the great majority of these were temporary visitors for pleasure or business. *Id.* at 4. In the same year, 5,263,966 aliens departed the United States and the great majority of these were obviously nonimmigrants. *Id.* at 34. On the other hand, on the basis of alien address reports, there were 4,451,306 permanent resident aliens in the United States as of fiscal year 1977. *Id.* at 106. Only 462,315 permanent resident aliens were admitted to the United States in fiscal year 1977. *Id.* at 5.

[21] Thus, nonimmigrants are not saddled with the disabilities associated with a suspect class. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

state and federal income taxation. For example, students (holding an "F" visa) from some foreign countries are exempt by treaty from income tax on a portion of their earnings. *See, e.g.*, 19 U.S.T. 5280, 5304-05 (1967) (France); 23 U.S.T. 967, 999-1002 (1971) (Japan); 10 U.S.T. 984, 991-92 (1957) (Pakistan).

A number of diplomats and employees of international organizations (including the fathers of the student-respondents) are exempt by treaty from both federal and state income taxation on their salaries. *See, e.g.*, Art. X of the Income Tax Convention between the United States and the United Kingdom, 60 Stat. 1383; and Art. IX, § 9(b) of the Articles of Agreement of the International Monetary Fund, 60 Stat. 144; 61 *Opinions of the Attorney General of Maryland* 840 (1976) (World Bank employees exempt from Maryland income tax on their salaries). Compensation of employees of international organizations not exempt from taxation by treaty are exempt from federal income taxation under 26 U.S.C. § 893 and, by operation of Md. Ann. Code art. 81, § 280(a) (taxable net income on state returns equals federal adjusted gross income), may be exempt from state income taxation. Internal Revenue Service regulations implementing section 893 provide that international organization employees who seek to adjust their immigration status to that of a permanent resident alien must execute and file a waiver with the Attorney General, which results in the waiver of that statutory tax exemption. I.R.S. Reg. § 1.893. This adjustment, of course, would result in the waiver of any state income tax exemption to which such employees may have been entitled. On the other hand, IRS regulations do not require the surrender of an international organization employee's tax exemption upon adjustment of immigration status to permanent resident alien if the exemption is dependent upon a treaty. *Id.* Employees of only a few international organizations, such

as the World Bank and the Inter-American Development Bank, fall into this category.[22]

In summary, regardless of particular provisions of law an individual nonimmigrant could point to as the source of his preferential income tax advantage, all nonimmigrants are treated differently than citizens and permanent resident aliens. Like those who are not here long enough to contribute to the State's economy, they do not fully support the State or the University with income tax payments. And it is undisputed that state income tax payments are the major tax source of revenue for the operation of the University of Maryland.[23]

[22] There are 42 international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organization Immunities Act. 22 U.S.C. § 288-288d. They are listed in the historical note to 22 U.S.C. § 288. Of that number, the following organizations have treaty tax exemptions for salaries of their officers or employees. Inter-American Development Bank; International Bank for Reconstruction and Development, International Centre for Settlement of Investment Disputes; International Coffee Organization; International Court of Justice; International Development Association; International Finance Corporation; International Monetary Fund; North Atlantic Treaty Organization; United Nations Organization. *See* CCH Standard Federal Tax Reporter ¶4196.095. Thus, 31, or approximately three-quarters of the international organizations whose employees hold G-4 visa status are not covered by tax treaties and their employees lose their tax exemptions upon adjusting their immigration status to permanent resident alien. Thus, the income tax and immigration adjustment status of the fathers of the student-respondents is not even reflective of the situation of most G-4 visa holders — the subclass the students represent.

[23] Tuition and fee charges do not pay the full cost of a university education. The University of Maryland is principally supported by general state funds, special funds and federal funds. The largest of these is general fund revenues. In fiscal year 1981, the University of Maryland received a general fund appropriation of $164 million. State of Maryland, *Budget Message to the General Assembly and the Budget in Brief* (Jan. 21, 1981) at 30. Total general fund revenues for the State exceeded $2.6 billion, nearly half of which was provided by the state income tax. *Id.* at 14 & 21. State and local property taxes do not enter the general funds of the State. *Id.* at 14.

The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.*, nonimmigrants and other nonresidents. *See Starns v. Malkerson*, 401 U.S. 985 (1971). Over the long term, it is reasonable for the State to conclude that permanent resident aliens might contribute more to the cost of a university education and its economic well-being than nonimmigrants, especially in light of the undeniable fact that an adjustment of immigration status to that of permanent resident alien is necessary for nonimmigrants to remain in this country permanently. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that a State could not limit expenditures with respect to "tax revenues to which aliens have contributed on an *equal* basis with residents of the State." And, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not deny necessary benefits to resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." But where nonresident aliens have not contributed on an equal basis to tax revenues and have not paid their full share of taxes that support educational programs, a rational basis of limiting expenditures is permissible under the equal protection clause.[24]

[24] In addition to cost equalization and limitation of expenditures, the University relies upon administrative convenience as a third justification for the in-state policy's treatment of nonimmigrants, particularly the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population. At the College Park undergraduate campus of the University of Maryland, 17 staff members devote a substantial portion of their time to administering the in-state determination and appeal process at an

II.

THE DENIAL OF AN IN-STATE SUBSIDY TO NONIMMIGRANTS DOES NOT CONSTITUTE STATE REGULATION OF IMMIGRATION PROHIBITED BY THE SUPREMACY CLAUSE.

In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605-06 (1976), this Court noted:

> We do not suggest . . . that a State . . . may not be permitted some discretion in determining . . . whether aliens may receive public benefits. . . .

And in *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), the Court stated:

> [We have] never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised . . . . [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.

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estimated cost of more than $100,000 annually. Affidavit of Wayne Sigler, ¶7 (J.A. 54A). More than 700 petitions for in-state classification are filed annually. *Id.* If individualized hearings on additional domiciliary indicia were given to nonimmigrants, the cost of administering the system would undoubtedly increase. But the University's policy of limiting in-state classification hearings for nonimmigrants to the "objective criterion" of changes in their immigration status reduces the need for and burden and expense of long, complicated hearings (many of which may require interpreters) with respect to other domiciliary indicia. Affidavit of Wayne Sigler, ¶8 (J.A. 54A). The University's policy promotes efficiency and reduces costs so that funds may be better spent on educational needs, by requiring full-scale hearings on domiciliary indicia only when a G-4 alien or other nonimmigrant student has adjusted his immigration status.

Under these principles the question of how a public university determines eligibility for preferential tuition benefits falls into permissible regulation.

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court said that a state statute which prohibited an alien from earning a livelihood so burdened the entrance or residence of aliens as to amount to a regulation of immigration. For the same reason, the Court in *Graham v. Richardson*, 403 U.S. 365 (1971), struck down stringent state residency requirements denying to resident aliens welfare benefits that were essential to life, literally forcing them out of the country. Chief Justice Burger summarized the principle of these cases in *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (emphasis added):

> These exclusions struck at the noncitizen's *ability to exist* in the community, a position seemingly inconsistent with the congressional determination *to admit the alien to permanent residence.*

This preemption doctrine has never been applied to an enactment which disadvantaged only nonimmigrants (rather than all aliens). Moreover, the doctrine has no application to the denial by a State of a benefit that, like a tuition differential, is not a necessity of life. Finally, where, as here, the state regulation is harmonious with the federal scheme, a preemption challenge must fail. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).[25]

In the present case, the decisions below disregarded these principles to fashion a rule automatically invalidating on supremacy clause grounds every asserted discrim-

[25] The Federal Government presently denies its educational benefits to G-4's and other nonimmigrants. *See* 45 C.F.R. § 177.201. In addition, it should be noted that employees of most international organizations derive their income tax advantage from federal law, 26 U.S.C. § 893 (1976), and are required to waive their tax exemption upon adjustment of immigration status. The rationale of the University's in-state policy is entirely consistent with this federal policy.

ination against an alien subclass. First, the rule of the lower courts is analytically unsound. It suggests that a supremacy clause violation can be justified upon the showing of a compelling interest (P.A. 47a). 489 F. Supp. at 668. This is absolutely false. *See Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84, 93 (1963). Moreover, such a per se rule refuses to recognize that this Court on Occasion has sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated. *See Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977).

Finally, the lower courts ignored the rule of *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976), that "even if . . . local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration. . . ." The University's in-state policy, like those of most public colleges and universities, has absolutely no impact on immigration and thus does not violate the supremacy clause.[28]

[28] The students argued in the district court that the cost equalization rationale of the University's in-state policy conflicted with the rationale behind the international agreements, which preclude federal and state taxation of salaries paid to employees of the international organizations. The lower court rejected this contention, holding that the purported conflict between two rationales was "too attenuated to warrant invalidating the University's policy" (P.A. 45a). 489 F. Supp. at 667.

III.

THE LOWER COURT REFUSED TO GIVE EFFECT TO THE DECISION IN *TOLL v. MORENO*, 441 U.S. 458 (1979), EMBRACED A CONSTITUTIONAL DOCTRINE DISFAVORED BY THIS COURT, AND ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S IN-STATE POLICY CREATED AN IRREBUTTABLE PRESUMPTION VIOLATIVE OF DUE PROCESS PRIOR TO JUNE 1978.

It is clear that ever since *Weinberger v. Salfi*, 422 U.S. 749 (1975), the irrebuttable presumption doctrine of *Vlandis v. Kline*, 412 U.S. 441 (1973), has been disfavored by this Court and will not be used to invalidate rationally based governmental policies. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *Vance v. Bradley*, 440 U.S. 93 (1979); *Friedman v. Rogers*, 440 U.S. 1, 7 n.8 (1979); *First National Bank v. Bellotti*, 435 U.S. 765, 772-74 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex*, 430 U.S. 961 (1977) (*mem.*); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Knebel v. Hein*, 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Although the University fully supports the position of the amici curiae that *Vlandis* is no longer good law and should be formally overruled, there are at least three theories under which this Court could reject the lower court's irrebuttable presumption holding without overruling the 1973 decision.

First, as this Court has done in the past, it could conclude that if the University's in-state policy is constitutional under the equal protection clause its operation is clearly permissible under the due process clause. *See New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976); *Trafelet v. Thompson*, 594 F.2d 623, 630 (7th Cir. 1979), *cert. denied*, 444 U.S. 906 (1979) ("Other courts have uniformly treated the doctrine of irrebuttable pre-

sumptions as coextensive with the equal protection clause.").[37]

Second, this Court could limit *Vlandis* to its precise circumstances, *viz.*, where the only rational basis for an otherwise irrational scheme was a state interest in administrative convenience. *See Vlandis v. Kline*, 412 U.S. 441 451-52 (1973). *See also* concurring opinion of Justice White. *Id.* at 456-59. Thus, *Vlandis* would not invalidate a state residency regulation justified by an interest other than mere administrative certainty. *See Sosna v. Iowa*, 419 U.S. 393, 409 (1975) (*Vlandis* does not invalidate "reasonable" residency requirements). Here, the University's in-state policy is independently supported by the cost equalization and limitation of expenditures rationales, and thus there is no unconstitutional irrebuttable presumption as found in *Vlandis*.

Third, this Court could find that the district court misconceived its mandate after the decision in *Toll v. Moreno*, 441 U.S. 458 (1979); that the irrebuttable presumption issue had been disposed of; and that it was free only to consider whether the University's policy violated equal protection and the supremacy clause.

In *Toll*, this Court indicated that the June 1978 clarifying resolution clearly setting forth the reasons for the University's denial of in-state benefits to nonimmigrants meant that the case was no longer "squarely within *Vlandis* as limited by Salfi," 441 U.S. at 461-62; or, in other words, there was no irrebuttable presumption. The case was remanded for consideration of "new issues" of

[37] Under the equal protection clause, it would make no difference whether the University's proffered rational bases were the "paramount" policy consideration in denying in-state status to nonimmigrants. *See* McGinnis v. Royster, 410 U.S. 263, 276 (1973). Any "conceivable" rational basis would justify the policy from its inception. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

constitutional law, *id.* 462, *viz.*, the equal protection and supremacy clause questions (*see Elkins v. Moreno* (P.A. 114a & 114a n.7), 435 U.S. at 658 and 658 n.7), not the due process question originally presented to this Court. There was no hint that the lower court was to sift through the record to determine whether the University's policy constituted an irrebuttable presumption at some earlier point in time.

Moreover, the reason given for the Court's action in *Toll* — that *Vlandis v. Kline* was inapplicable and that therefore the Court need not consider the question of overruling *Vlandis* as modified by *Weinberger v. Salfi* (P.A. 160a), *Toll v. Moreno,* 441 U.S. at 461-62 — makes it clear that this Court believed that for these parties, and as far as the entire case was concerned, the issue had been obviated. Obviously, if the Court thought that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be "overrule[d] or further limit[ed]" (P.A. 116a). *Elkins v. Moreno,* 435 U.S. at 660.

In short, this Court's conclusion that *Vlandis* is inapplicable to this litigation and that no irrebuttable presumption exists was the law of the case and not subject to reexamination by the lower courts. *See Venido Co. v. Lektro-Vend Corp.,* 434 U.S. 425, 427-28 (1978) (when a case has been once decided by the Supreme Court on appeal, and remanded to the lower court, "whatever was before the Supreme Court, and disposed of by its decree, is considered as finally settled").

In addition, the lower courts' bifurcated result on the due process question, based on the June 23, 1978, clarifying resolution, demonstrates the analytical bankruptcy of the irrebuttable presumption doctrine. That resolution merely reiterated "rational bases" for the

in-state policy argued previously and asserted a cost-equalization rationale present in the record in the district court and in pre-litigation statements of University officials. It did not change the language, operation, or effect of the in-state policy, which denied in-state benefits to nonimmigrants before June 1978, and did so afterwards.

For all of these reasons, the lower courts' conclusion that the pre-June 23, 1978, in-state policy violates the due process clause should be reversed, and *Vlandis v. Kline* should be overruled.

IV.

THE LOWER COURTS' ORDERING OF RETROACTIVE TUITION REFUNDS VIOLATES THE ELEVENTH AMENDMENT.

It is apparent that the district court on remand from this Court went out of its way to decide the irrebuttable presumption question for the 1976-78 period, to construe the June 28, 1978, clarifying resolution as a retroactive substantive policy change, and to reaffirm its July 1976 order solely to enable the international bank students to claim refunds of in-state tuition from the State of Maryland. However, the district court's handling of the refund issue, as well as its endorsement by the Fourth Circuit, cannot be squared with the terms of the August 1976 stay order, the eleventh amendment to the Constitution, or common sense.

First, the July 13, 1976, district court order was effectively vacated when this Court vacated the judgment of the court of appeals on April 30, 1979. Moreover, as a legal and practical matter, the old district court order could not exist at the same time as that court was assuming jurisdiction to decide again the irrebuttable presumption issue. *See Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936) (appellate court could not leave in effective operation the final decree of the district court and at the same time reinvest that court with

jurisdiction to retry the case). At that point, the old order was a nullity and the University's in-state policy was presumably (and in the petitioners' view, in fact) constitutional. By entering a new order in 1980 reaffirming the 1976 order and expressly mandating retroactive refunds, the lower court was obviously trying to circumvent the eleventh amendment's ban on the award of monetary relief against the State. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). See letters from counsel transmitting proposed orders (J.A. 41A, 42A & 65A-67A).

Second, the lower courts compounded their error and the violation of the State's eleventh amendment rights by ordering retroactive monetary relief for the post-June 23, 1978, period, even though the in-state policy had been declared constitutional on due process grounds after that date (P.A. 28a), 480 F. Supp. at 1125, and was not declared unconstitutional on different grounds until May 30, 1980. Although styled a reaffirmation of the 1976 order, the May 30, 1980, order for the first time required relief on the basis of two issues not decided until 1980 (one of which — the supremacy clause question — had not even appeared in the initial complaint.)

Third, although the University was willing to make refunds as a condition of obtaining the stay of August 3, 1976, this can be regarded as a waiver of eleventh amendment immunity *only* to the extent indicated, *i.e.*, refunds would be made if "the Court's Order of July 13, 1976, were finally affirmed on appeal" (P.A. 100a). *See Edelman v. Jordan*, 415 U.S. at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1908).").

Clearly, the terms under which refunds would be available under the stay order were not met. The University was successful in this Court and the judgment of the court of appeals and the 1976 order were vacated. In fact, the 1976 order has never been — and never can be — "finally affirmed on appeal." Moreover, the University's understanding of the terms of the 1976 stay is consistent with the view the court of appeals took in 1977 when it stayed its mandate pending the University's filing of a petition for certiorari. That stay order was entered "on the same terms as the district court originally granted its stay namely that should the appellant's petition for writ of certiorari prove unsuccessful" refunds would be available to eligible students (P.A. 104a). It is apparent that in light of the history of the *Moreno* litigation and the plain language of the stay order, the University has not waived its eleventh amendment immunity.

CONCLUSION

In summary, the lower courts impermissibly over-extended the suspect class equal protection analysis and the state regulation of immigration doctrine beyond any decision of this Court and erroneously decided the due process and eleventh amendment issues to make the University pay a price for a rationally based in-state policy. For all of these reasons, the decision of the circuit court affirming the district's injunction of May 30, 1980, and judgments of May 30, 1980, and June 24, 1980, should be reversed and *Vlandis v. Kline* should be overruled.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the University of Maryland's policy of denying the benefits of in-state status to aliens holding nonimmigrant "G-4" visas (under 8 U.S.C. § 1101(a)(15)(G)(iv)) even when they are domiciled in Maryland, while granting such benefits to citizens and immigrant aliens domiciled in Maryland, creates a classification based on alienage that violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Supremacy Clause on either of the following grounds: (a) that it interferes with Congress's exclusive control over immigration by imposing upon visaholders allowed by Congress to be domiciled in this country discriminatory burdens not contemplated by Congress; or (b) that, as applied to G-4 visaholders who are exempt from federal and state income taxes on their official salaries under international agreements to which the United States is a party, the policy interferes and conflicts with an objective of those international agreements.

3. Whether the courts below correctly held that, for the two-year period between the District Court's initial order and the University's "Clarifying Resolution" of June 23, 1978, the University's policy of refusing to allow aliens holding G-4 visas to prove Maryland domicile for the purpose of obtaining the benefits of in-state status, while at the same time basing the award of such status on Maryland domicile, created an irrebuttable presumption in violation of the Due Process Clause of the Fourteenth Amendment.

4. Whether the courts below correctly held that the University is required to make refunds of tuition differentials to respondents and members of their class for the period between the date of the first injunctive order in 1976 and the date of the most recent injunctive order in 1980, on the ground that the University had agreed to such refunds as a condition of a stay pending appeal and thus waived any Eleventh Amendment immunity.

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STATEMENT OF THE CASE

The Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.*, divides aliens to be admitted into the United States into two general categories: immigrant aliens, who are admitted for permanent residence; and nonimmigrant aliens, who are permitted to enter the United States under twelve different classifications, 8 U.S.C. § 1101(a)(15)(A)-(L), which correspond to the different visas that they hold.

The University of Maryland's In-State Policy at issue here (P.A. 167a-171a)[1] governs the award of in-state status for purposes of obtaining the lower, in-state tuition and fee rates at the University and for purposes of obtaining more favorable treatment for admission to the University. That policy allows citizens and immigrant aliens to obtain such in-state status upon a showing that they (or the persons upon whom they are financially dependent) are domiciled in Maryland, but it prohibits all nonimmigrant aliens from obtaining in-state status.

Respondents are nonimmigrant aliens who hold what are called "G-4" visas (or are dependents of such G-4 visaholders). G-4 visas are those issued to nonimmigrant aliens admitted under 8 U.S.C. § 1101(a)(15)(G)(iv) as "officers, or employees of . . . international organizations [entitled to enjoy privileges and immunities under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families." In particular, the named respondents are (or were at the time of suit) dependents of employees of the Inter-American Development Bank or of the International Bank for Reconstruction and Development (World Bank) (P.A. 14a-15a, J.A. 55A). These organizations, and the other public international organizations to which 8 U.S.C. § 1101(a)(15)(G)(iv) applies,

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[1] The Appendix to the Petition for Writ of Certiorari is cited in this brief as "P.A."; the Joint Appendix as "J.A."; and the Brief of Petitioners as "Pet. Br." Petitioners University of Maryland and its President, John S. Toll, are referred to herein as "the University."

are established pursuant to treaties or international agreements to which the United States is generally a party. The G-4 visaholders employed by these organizations are exempt from federal, state, and local income taxes on their salaries from such organizations. This exemption is established by the treaties or international agreements creating the organizations or by virtue of federal and state statute, and cannot be waived by the individual employees.[2] These employees, however, are subject to *all other* federal, state, and local taxes, including income taxes on all income other than their international-organization salaries.

Since the respondents were prohibited from obtaining in-state status under the University's policy of exclud-

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[2] In the case of the international organizations employing the respondents' fathers, as well as several other public international organizations, the tax exemption on the employees' salaries from the organizations is provided by the treaties or agreements establishing the organizations and applies both to the G-4 employees of the organizations and to immigrant aliens employed by the organizations. See Addendum A hereto, which lists the organizations with such treaty-based tax exemptions and cites and quotes the relevant provisions of the treaties or agreements establishing the exemptions. Such tax exemptions are for the benefit of the international organizations and their member nations and cannot be waived by individual employees. 41 Op. Atty. Gen. 170, 172-73 (1954); Treas. Reg. § 1.893-1(c)(2). (These exemptions also apply to U.S. citizens working for such organizations in other countries.)

For the other public international organizations covered by the International Organizations Immunities Act ("IOIA"), their G-4 employees are exempt from federal taxes by virtue of the IOIA itself (§ 4(b), 59 Stat. 670, amending Internal Revenue Code, now codified at 26 U.S.C. § 893) and are exempt from Maryland income tax by operation of Md. Ann. Code, art. 81, § 280(a) (taxable net income on state returns equals federal adjusted gross income). There is no provision for these G-4 visaholders to waive either such statutory tax exemption, although such waiver is required for *immigrant* visaholders employed by these organizations (which do not have a treaty-based tax exemption) if they wish to remain in immigrant status. See 8 U.S.C. § 1257; Treas. Reg. § 1.893-1(b)(4). See also p. 25, n.21, *infra*.

ing all nonimmigrant aliens, they brought the instant class action in 1975 challenging that policy as applied to them and to the class of G-4 visaholders (or dependents of such visaholders). They attacked that policy on due process, equal protection, and Supremacy Clause grounds, arguing that they and their fathers were domiciled in Maryland and that the University was violating those constitutional provisions by treating them differently from other Maryland domiciliaries. The University, however, attempted to justify its flat exclusion of all nonimmigrants (including respondents) from in-state status on the ground that that exclusion simply represented a proper implementation of the state law of domicile. According to the University, its In-State Policy was based on domicile and the reason that nonimmigrant aliens were excluded was that they could not be domiciled in Maryland under state law. (See P.A. 79a and the University's representations to this effect quoted in Addendum B hereto, pp. 4a-6a.) With specific reference to respondents, the University argued that G-4 visaholders were necessarily precluded by the terms and conditions of their visas from being domiciled in Maryland (J.A. 29A-30A, P.A. 78a-79a).

In its decision of July 13, 1976, the District Court rejected that contention, holding that nothing in either federal immigration law or the Maryland law of domicile prevented a G-4 visaholder from being domiciled in Maryland (P.A. 79a-88a). The court concluded that the University's policy created an irrebuttable presumption of non-domicile that was not necessarily true for G-4 visaholders, and thus denied those visaholders due process of law under *Vlandis* v. *Kline*, 412 U.S. 441 (1973). (P.A. 88a-89a, 98a.)[3] The court enjoined enforcement of the policy with respect to the named plaintiffs and the members of their class (P.A. 98a-99a), but stayed its order pending appeal, on the basis of the University's repre-

[3] The District Court certified this case as a class action on behalf of G-4 visaholders, or dependents of such visaholders, attending or interested in attending the University (P.A. 97a-98a).

sentations that it would make appropriate refunds if the case was "finally affirmed on appeal" (P.A. 99a-100a). The Court of Appeals affirmed (P.A. 101a-102a).

On writ of certiorari, this Court confirmed that *Vlandis* squarely governed this case, and it then proceeded to examine the question whether G-4 visaholders could be domiciled in Maryland. *Elkins* v. *Moreno*, 435 U.S. 647, 660-62 (1978) (P.A. 116a-118a).[4] This Court held that, unlike most nonimmigrant aliens, G-4 visaholders (along with a few similar categories of nonimmigrant visaholders) were not precluded by federal law from being domiciled in the United States. 435 U.S. at 663-68 (P.A. 119a-124a). The Court observed that with respect to most of the twelve major categories of nonimmigrant aliens listed at 8 U.S.C. § 1101(a)(15)(A)-(L), Congress "expressly conditioned admission" on the alien's "intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." 435 U.S. at 665 (P.A. 121a). It listed, as examples, the holders of the following nonimmigrant visas: B (temporary visitors), F (foreign students), C (aliens in immediate and continuous transit), D (vessel crewmen landing temporarily), and H (temporary workers). *Id.* By contrast, this Court noted, "Congress did *not* restrict every nonimmigrant class" and, in particular, placed no such restrictions on the intent of G-4 visaholders. 435 U.S. at 666 (P.A. 122a).[5] Accordingly, the Court stated, Congress "was willing to allow nonrestricted nonimmi-

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[4] In this Court, the University continued to press its position that its In-State Policy was based on domicile and that G-4 and other nonimmigrant visaholders were lawfully excluded because they could not be domiciled in Maryland under state law. See the University's representations quoted in Addendum B, pp. 7a-8a, and this Court's recognition that the state law of domicile was the basis of the University's policy, 435 U.S. at 658-60 (P.A. 114a-116a).

[5] Other unrestricted nonimmigrant categories include E (aliens admitted under certain treaties of commerce) and I (certain foreign media representatives).

grant aliens to adopt the United States as their domicile." 435 U.S. at 666 (P.A. 122a).

Having resolved that question of federal law, this Court certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 visaholders are "incapable *as a matter of state law* of becoming domiciliaries of Maryland." 435 U.S. at 669 (P.A. 124a-125a) (emphasis added). That court, in *Toll* v. *Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (P.A. 137a), answered the certified question "No," stating that "nothing in the general Maryland law of domicile renders G-4 visaholders, or their dependents, incapable of becoming domiciled in this State" (P.A. 156a).

Thus, it is clear that G-4 visaholders can be lawfully domiciled in the United States and in Maryland. Of course, not every G-4 visaholder residing in Maryland will be domiciled there; such individuals must still meet the general test for Maryland domicile (based on intent) discussed by the Maryland Court of Appeals in *Toll* v. *Moreno*, *supra* (P.A. 149a-153a). The important fact is that such visaholders, unlike most nonimmigrants, are capable of establishing domicile in Maryland under federal and state law, and that it is only the relatively small number of nonimmigrant visaholders in this situation, rather than the general class of nonimmigrants, who might qualify for in-state status if subject to the same test of domicile as citizens and immigrant visaholders.

The University, however, did not simply accept these decisions and apply its test of domicile to all students (or their parents) who could be domiciled in Maryland, including the G-4 visaholders. Rather, on June 23, 1978, the University adopted a "Clarifying Resolution" (P.A. 172a-175a). That resolution did not purport to amend the In-State Policy; indeed, it specifically "reaffirmed" that policy (¶ 4). It stated, however, that the policy had adopted a definition of domicile that excluded all nonimmigrant aliens (even those who could in fact be domiciled in Maryland under federal law and Maryland

law) (¶ 2), and that that policy served a number of purposes and interests "whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law" (¶ 3). Obviously, this resolution was not necessary to exclude the great majority of nonimmigrants from in-state status; they would have been excluded under an even-handed test of domicile. Rather, the resolution affected only the G-4 and similar visaholders who could otherwise have qualified for in-state status under the test of domicile applicable to citizens and immigrant aliens.

When the case returned to this Court from the Maryland Court of Appeals, the University advised this Court of the adoption of the Clarifying Resolution and requested further briefing and argument (J.A. 34A-35A). Without further briefing, however, this Court issued its *per curiam* opinion in *Toll* v. *Moreno*, 441 U.S. 458 (1979) (P.A. 157a-160a), vacating the judgment of the Court of Appeals and remanding the case to the District Court "for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (P.A. 160a).

Following the remand from this Court, the District Court and the Court of Appeals again held in favor of respondents in the decisions which the University challenges here.[6]

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[6] The University and the *amici curiae* supporting its position have greatly overstated the impact of those decisions. Despite the University's assertions regarding the number of nonimmigrant aliens in the University, the State, and the country (Pet. Br. 5 n.3, 6, 27 n.20), and contrary to the *amici*'s fears that the decisions below would force state universities to allow large numbers of nonimmigrants to obtain in-state status (Br. of Ala. *et al.* 3; Br. of Amer. Coun. on Educ. *et al.* 12), the lower courts' decisions would not affect most nonimmigrants. As indicated above, the only nonimmigrants affected are those capable of establishing domicile in the State (under federal and state law), and they are only a small

SUMMARY OF ARGUMENT

1. *Equal Protection.* The courts below held that the University's In-State Policy, both before and after the 1978 Clarifying Resolution, violates the Equal Protection Clause. That holding rests firmly on the established principle that state classifications based on alienage are inherently suspect and subject to strict judicial scrutiny. This principle applies even when the enactment discriminates only against a sub-class of aliens rather than against all aliens, so long as the enactment "is directed at aliens and . . . only aliens are harmed by it." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). The University's In-State Policy falls within this proscription. It allows citizens and immigrant aliens to obtain in-state status upon a showing of domicile in the State but prohibits nonimmigrant aliens from doing so. This policy does not raise questions regarding nonimmigrants generally, since most would be unable, by virtue of federal law, to show domicile in any event. Rather, the policy discriminates only against those nonimmigrant aliens, such as G-4 visaholders, who can be and are domiciled in Maryland. Among Maryland domiciliaries they are the only ones precluded from obtaining in-state status regardless of domicile. The policy thus draws a distinction based solely

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fraction of the total number of nonimmigrants. For example, of the 554 nonimmigrant students registered at the University in the fall of 1979, only 72 were G-4 visaholders, and the great majority of the others fell into visa categories that preclude domicile in this country (J.A. 52A-53A).

The University and its supporting *amici* also assert that the University's In-State Policy is common to "most public colleges and universities" in the country (Pet. Br. 5; Br. of Ala. *et al.* 3, 10; Br. of Amer. Coun. on Educ. *et al.* 5, 9). This assertion is also misleading. We showed in our Supplemental Brief for Respondents in Opposition that many state universities—including most in the two areas with most, if not all, G-4 visaholders (*i.e.*, the Washington, D.C., and New York City areas)—have policies that would expressly allow or would appear to allow the holders of G-4 and similar nonimmigrant visas that permit U.S. domicile to obtain in-state status if they can show that they are domiciled in the State. Supp. Br. for Resp. in Opp. at 4-5 & App. A.

on alienage. Even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and harms *only* aliens. Hence, strict scrutiny is required.

The University argues that this classification should not be subject to strict scrutiny because the discrimination is against nonimmigrant, rather than immigrant, aliens. But the rationale for strict scrutiny is not so limited. At the least, strict scrutiny should apply where, as here, the State subjects nonimmigrant aliens *domiciled in the State* to burdens not imposed on other state domiciliaries. None of the other reasons advanced by the University for why strict scrutiny should not apply here is persuasive.

The University concedes that its policy cannot withstand a test of strict scrutiny, and that concession is clearly correct. Moreover, even under a less stringent test, the interests asserted by the University cannot justify its classification between citizens and immigrants domiciled in Maryland and G-4 and similar nonimmigrants who are likewise so domiciled. Although some of these nonimmigrant visaholders (such as G-4's) are partially exempt from state income taxes, that exemption is insufficient to justify the University's classification, when these domiciliaries may make significant contributions to the State and when the University makes no effort to classify other state domiciliaries on the basis of their tax liability or payments.

2. *Supremacy Clause.* The University's In-State Policy violates the Supremacy Clause for two reasons.

(a) It impermissibly encroaches upon the exclusive federal power over immigration by imposing upon a class of aliens lawfully admitted to and domiciled within the United States a discriminatory burden not contemplated by Congress in admitting them. Where Congress has decided that a class of nonimmigrant aliens is to be admitted to this country on terms that permit them to be domiciled here, a State may not, on account of their immigration status, subject them to restrictions that it does not

impose on other state domiciliaries (at least where, as here, the State's basic political or governmental functions are not involved).

(b) In addition, the University's policy, as applied to G-4 visaholders who are exempt from federal and state income taxes on their international-organization salaries under international agreements to which the United States is a party, undermines and interferes with an objective of those agreements by penalizing these visaholders domiciled in Maryland on account of that income tax exemption.

3. *Due Process.* Respondents also challenged the University's policy on the ground that it created an irrebuttable presumption of nondomicile that denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, *supra*. In *Elkins* v. *Moreno*, *supra*, this Court held that that contention was squarely governed by *Vlandis;* and its decision in *Toll* v. *Moreno*, *supra*, which remanded the case for consideration of the intervening Clarifying Resolution, did not decide to the contrary. On remand, the lower courts correctly held that until the Clarifying Resolution of June 23, 1978, the University's paramount concern in awarding in-state status was with domicile under state law and that thus, until that time, the validity of its policy for due process purposes remained governed by *Vlandis*. Moreover, this Court should not reach out to overrule *Vlandis*, since that decision, as limited by *Weinberger* v. *Salfi*, 422 U.S. 749, 771-72 (1975), represents a principled and useful implementation of procedural due process.

4. *Eleventh Amendment.* The District Court stayed its original order of July 13, 1976, pending appeal on the basis of the University's representations that, if the appeal was not successful, it would make the respondent class whole back through that date. In its latest order, the District Court reaffirmed its original order and ordered the University, as an implementation of the conditions of the initial stay, to make refunds of the differ-

ence between out-of-state and in-state tuition and charges to any member of the respondent class who could show Maryland domicile for the period from July 13, 1976, to date. The University's claim that this refund order violates the Eleventh Amendment was properly rejected by both courts below on the ground that the University waived its Eleventh Amendment immunity in obtaining the original stay.

ARGUMENT

I. THE UNIVERSITY'S IN-STATE POLICY DISCRIMINATES AGAINST A CLASS OF NONIMMIGRANT ALIENS DOMICILED IN MARYLAND, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

We address first the lower courts' holding that the University's In-State Policy, which denies G-4 visaholders the opportunity to obtain in-state status, violates the Equal Protection Clause. That holding applies to the University's policy both before and after the Clarifying Resolution of June 23, 1978.

A. The University's Policy Creates a Classification Based on Alienage and, as Such, Is Subject to Strict Judicial Scrutiny.

It is well established that state classifications based on alienage are inherently suspect and are "subject to strict scrutiny whether or not a fundamental right is impaired." *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971). See also *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 601-02 (1976); *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7. Under this principle, such classifications can be justified only if the State can show that its purpose or interest is substantial and that "its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest" (*In re Griffiths*, *supra*, at 721-22) and is "precisely drawn in light of

the acknowledged purpose" (*Sugarman* v. *Dougall*, *supra*, at 643).

In *Nyquist* v. *Mauclet*, this Court not only reaffirmed these principles, but made clear that they apply even when the state enactment discriminates only against a certain sub-class of aliens rather than against all aliens. That case involved a provision of a New York statute that barred state financial assistance for higher education to aliens who had neither applied for U.S. citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous' class of aliens" and "does not distingunish between citizens and aliens *vel non*." 432 U.S. at 7-8. The Court rejected that argument, pointing out that the statute "is directed at aliens and that only aliens are harmed by it," and "[t]he fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* at 9. Likewise, the state statute struck down in *Graham* v. *Richardson*, *supra*, had not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a 15-year durational residency requirement. Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972); *Mathews* v. *Lucas*, 427 U.S. 495, 504-05 n.11 (1976).

As the courts below recognized, the University's In-State Policy falls directly within the principles of those decisions. That policy on its face treats a sub-class of aliens—G-4 and other nonimmigrant aliens—differently from citizens and immigrant aliens. Under it, citizens and immigrant aliens are granted in-state status if they (or those upon whom they are dependent) can show domicile in Maryland. Nonimmigrant aliens, however, are universally barred from obtaining in-state status, even though in fact some categories of nonimmigrants—namely, G-4 and similar visaholders—can be domiciled in Maryland under federal and state law.

Since the University, in attempting to justify this discrimination, refers repeatedly to the denial of in-state benefits to nonimmigrant aliens *in general*, it is important to emphasize that the effect of the discrimination worked by the policy falls only on nonimmigrant aliens *who are lawfully domiciled in Maryland*. Respondents have never contended that the University's policy of denying in-state benefits to nonimmigrant aliens is unconstitutional as applied to nonimmigrant visaholders who are unable as a matter of federal or state law to establish domicile in the State. Such nonimmigrants are in no way harmed by the University's policy, because even if they were accorded equal treatment with citizens and immigrant aliens—*i.e.*, subject to a test of domicile—they would fail to qualify for in-state status. Rather, the disadvantaged class consists of the G-4 and few other categories of nonimmigrant visaholders who, under the principles of this Court's decision in *Elkins* and the Maryland Court of Appeals' decision in *Toll*, are capable of establishing domicile in Maryland (see pp. 4-5, *supra*) and who are so domiciled. They, unlike most nonimmigrants, could enjoy the benefits of in-state status if they were treated on an equal basis with other Maryland domiciliaries who happen to be U.S. citizens or immigrant visaholders.

Thus, the classification established by the University's policy is between two kinds of Maryland domiciliaries: citizens and immigrant aliens who are domiciled in Maryland are allowed to obtain in-state status; G-4 and similar nonimmigrant aliens *who are likewise so domiciled under state law* are not. The latter are the *only* Maryland domiciliaries precluded from proving domicile and thus obtaining in-state status.[7] The policy thus draws

[7] The University claims that some citizens are also excluded from in-state status without reference to domicile, and gives the example of members of the Armed Forces assigned by the military to attend the University for educational purposes (Pet. Br. 5). A review of the University's In-State Policy shows that claim to be erroneous. The In-State Policy provides that citizens will be entitled to in-state

a line based solely on alienage. As in *Nyquist*, even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and disadvantages *only* aliens. Hence, the classification is one based on alienage to which strict scrutiny applies under the principles of this Court's decisions.

The University argues, however, that the strict-scrutiny standard was erroneously applied by the courts below, and should not be applied by this Court, because the individuals discriminated against hold nonimmigrant rather than permanent resident visas. It contends that this Court should hold that, while discrimination against all aliens or against immigrant aliens is subject to strict judicial scrutiny, the present discrimination against non-immigrant aliens should not be judged by that standard, but by the more lenient "rational basis" test. However, none of the reasons advanced by the University in sup-

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status in a number of listed cases. One is where the student is dependent upon a parent or spouse domiciled in Maryland for six months; another is where a financially independent student has been domiciled in Maryland for six months; still another is where an Armed Forces student has been stationed on active duty in Maryland for six months unless he has been assigned to the University for educational purposes (P.A. 168a). Thus, although an Armed Forces student assigned to the University for educational purposes could not qualify for in-state status by virtue of the special provision for Armed Forces members, *he could still qualify by showing that he has been domiciled in Maryland for six months.*

The University also states that its policy excludes students who are financially dependent on parents or spouses not domiciled in the State (Pet. Br. 5). That is true but irrelevant. Domicile is still the test for financially dependent citizen or immigrant students; it is simply the domicile of their parents or spouses that is relevant. (Indeed, the references in this brief to "Maryland domiciliaries" are intended to cover those whose status at the University is, or would be, determined by a Maryland domiciliary, whether financially independent students domiciled in Maryland or students dependent on a Maryland domiciliary.) *The only individuals who are excluded from in-state status regardless of the domicile of either the students themselves or of the parents or spouses upon whom they are dependent are a class of aliens.*

port of its position provides any justification for a holding that the strict-scrutiny standard is inappropriate to judge the University's alienage-based classification in the present case.

1. The first reason advanced by the University to show why strict scrutiny is not appropriate here is that all prior cases in which this Court has applied that standard have involved a statute or practice that discriminated against permanent resident aliens. The University then claims that this Court's opinions in those cases suggest that its decisions to apply strict scrutiny were limited to discrimination against immigrant aliens (Pet. Br. 19-22). That contention is erroneous.

It is true that the above-cited cases applying strict scrutiny involved either all aliens or permanent resident aliens. But that simply reflects the fact that the enactments in those cases had no practical effect on the great majority of nonimmigrant aliens and were not being challenged by nonimmigrants. See, *e.g.*, *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 4 ("Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country . . . the bar of [the challenged statute] is of practical significance only to resident aliens").[8] This Court has never suggested in any of its cases that different modes of analysis apply to state classifications based on alienage depending upon the visa status of the aliens discriminated against.

While there may be support for affording less protection to true nonresident aliens, in the sense of aliens living outside the United States,[9] the reasons for strict

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[8] Similarly, since most nonimmigrant visaholders (unlike G-4 and similar nonimmigrant aliens) are present in this country on only a temporary basis for limited purposes, they would not ordinarily be in a position to apply for a license to practice law (*In re Griffiths*, *supra*), for state civil service employment (*Sugarman* v. *Dougall*, *supra*), or for welfare benefits (*Graham* v. *Richardson*, *supra*).

[9] See cases cited by the District Court in footnote 8 of its April 17, 1980 opinion (P.A. 36a).

scrutiny apply equally to aliens lawfully residing within the United States regardless of their visa status. The principle underlying strict scrutiny for certain classifications is that the class discriminated against is a "discrete and insular" minority (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)) that has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio Indep. School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973)). Thus, the reason that this Court has found state classifications based on alienage to be suspect and subject to strict scrutiny is its recognition that aliens are politically powerless, since they cannot vote and hence "have no direct voice in the political processes" (*Foley* v. *Connelie*, 435 U.S. 291, 294 (1978)), and have often suffered from prejudice and purposeful discrimination by the majority. As this Court stated in *Graham* v. *Richardson*, *supra*, 403 U.S. at 372, aliens "are a prime example of a 'discrete and insular' minority [citation omitted] for whom such heightened judicial solicitude is appropriate." As the District Court noted, "[t]his treatment is seemingly premised on the aliens' minority status in the community, not their potential citizen status" (P.A. 38a). See also J.H. Ely, *Democracy and Distrust*, 161-62 (1980). Moreover, this Court has made clear that even a sub-class of aliens is entitled to this protection so long as the enactment discriminating against them is directed at aliens and harms only aliens (as does the University's classification at issue here). *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 9. This analysis is not limited to immigrant aliens. In fact, nonimmigrant aliens are at least as "discrete and insular" a minority in need of "heightened judicial solicitude" as are other aliens.

To be sure, as the University notes (Pet. Br. 20), this Court has in some of its opinions referred to certain typical attributes of permanent resident aliens (*e.g.*,

payment of all taxes). But those references were generally made in the context of determining whether the enactments in question could survive strict scrutiny, not whether strict scrutiny applied. *Graham* v. *Richardson*, *supra*, 403 U.S. at 376; *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 12. See also *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 645. The Court has never suggested that nonpayment of or exemption from certain taxes, or any of the other attributes of certain nonimmigrant aliens, is a sufficient reason to lower the equal protection standard applicable to state action discriminating against them.[10] The important fact is that where, as here, the State has drawn a line based on alienage, that classification is suspect and must be subject to particularly searching judicial inquiry.

At the least, the strict-scrutiny standard is appropriate to judge the validity of a state enactment discriminating against nonimmigrant aliens where, as in the case of the University's policy, the discrimination falls only on those nonimmigrants, such as G-4's, who are similarly situated to citizens and immigrant aliens with respect to the establishment of domicile in this country and in the State. To the extent that the Court's references in prior opinions to the contributions of resident aliens may be relevant to the standard of review, it is significant that G-4 visaholders may reside in the State for many years, must obey state laws, contribute to the economic growth of the State through payment of all taxes except taxes on their salaries from the international organizations, and may, as in *Nyquist*, "play a

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[10] The decision in *United States* v. *Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979), cited by the University (Pet. Br. 21), is inapposite here. That case involved a Japanese fishing boat that came within the off-shore waters (within 200 miles) over which the United States claimed certain jurisdiction—not an alien admitted to the United States, and certainly not one who could be domiciled here. More important, that case involved a *federal* statute, and, as shown below (p. 21), Congress has broad powers, that the States do not possess, to impose restrictions on aliens.

role—perhaps even a leadership role—in other [*i.e.*, non-political] areas of import to the community" (432 U.S. at 12). See also p. 24, *infra*. If such individuals are domiciled in the State under the State's own law, they should be entitled to the same protection as immigrant aliens so domiciled.[11] The fact that they are exempt from taxes on their international-organization salaries should not change this result. As noted above, that exemption is established by treaties or international agreements or by virtue of federal and state statute, and is not waivable by the individual G-4 employees. See p. 2, *supra*.[12] When the aliens in question are domiciled in the State and may make significant contributions to the

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[11] It is no answer to say that the G-4 visaholders in question could avoid the discrimination against them by simply adjusting their status to immigrant. First of all, as a factual matter, the G-4 visaholders employed by the international organizations employing respondents' fathers could not voluntarily adjust their status to immigrant while working for those organizations. Such an adjustment requires a certification from the Secretary of Labor that there are not sufficient qualified and available workers for the job in the United States (8 U.S.C. § 1182(a)(14)); and this requires the alien's employer to file job offer forms certifying that they have looked for and cannot find U.S. citizens who are equally qualified (20 C.F.R. § 656.21). Since the international banks employing respondents' fathers are required, under the international agreements establishing them, to pay "due regard to the importance of recruiting the staff on as wide a geographical basis as possible" (Agreement Establishing the Inter-American Development Bank (cited in Addendum A), art. VIII, § 5(e); Articles of Agreement of the International Bank for Reconstruction and Development (cited in Addendum A), art. V, § 5(d)), they are precluded from making the search for U.S. citizens that is necessary to make the required certification. (See also J.A. 20A, 24A-25A.) In any event, this Court made clear in *Nyquist* that the aliens' ability to adjust their status voluntarily does not change the appropriateness of strict scrutiny for a classification discriminating against such aliens. 432 U.S. at 9 n.11.

[12] In fact, immigrant visaholders working for the same international organizations as the respondents' fathers are likewise exempt from taxes on their bank salaries under the international agreements establishing the organizations. See p. 2, n.2, *supra*.

State, that partial income tax exemption (over which they have no control) is clearly an insufficient reason to lower the standard of protection they receive under the Equal Protection Clause.[13] In short, at least where, as here, state action discriminates against such nonimmigrant aliens domiciled in the State by treating them more harshly than citizens or immigrant aliens so domiciled, that classification is appropriately subject to strict scrutiny.[14]

2. The second argument advanced by the University for why strict scrutiny should not apply is that, since many aliens are eligible for in-state benefits, "it is irrational to contend that the in-state policy denies its benefits on the basis of alienage" (Pet. Br. 22). In *Nyquist* the appellants similarly contended that the statute in question distinguished "only within the 'heterogeneous' class of aliens" and not "between citizens and aliens *vel non*." 432 U.S. at 8. As noted above, this Court expressly rejected that argument, stating that "[t]he important points are that [the statute] is directed at aliens

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[13] We discuss below whether that tax exemption is sufficient to justify the University's discrimination at issue here under whatever equal protection standard applies. See pp. 24-25, *infra*.

[14] It is for this reason that the arguments of Professor Rosberg, so heavily relied on by the University, do not support its contention. Rosberg makes clear that his thesis is premised on the fact that nonimmigrants "cannot have an intention of remaining here indefinitely . . . ." G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, S. Ct. Rev. 275, 312 (1977). That article was written prior to, and does not take account of, this Court's holding in *Elkins* that G-4 and a few similar categories of nonimmigrant visaholders *can* have the intention of remaining in the United States indefinitely. When *these* nonimmigrants are treated differently from citizens and immigrants, despite their similar ability to be domiciled in the United States, Rosberg would presumably agree that the classification is one based on alienage rather than nonresidence. We note that, in a portion of his article not quoted by the University, Rosberg cites the District Court's initial decision in this case with approval. *Id.* at 313 n.143.

and that only aliens are harmed by it. The fact that the statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." 432 U.S. at 9. Here, as in *Nyquist*, although not all aliens are barred from in-state benefits by the University's policy, the policy is directed at a class of aliens and only aliens are harmed by it. Hence, strict scrutiny is the applicable standard.

3. The University's third argument is that strict scrutiny should not apply because "in-state tuition and fees are not 'necessities of life'" (Pet. Br. 22). Again, this argument was raised in *Nyquist*: "Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien 'access to the necessities of life.'" 432 U.S. at 8 n.9. This Court rejected that contention, noting first that the statement of purpose in the statute itself referred to higher education as a "necessity," and stating further that

> "in any event, the Court noted in *Graham* v. *Richardson* . . . that classifications based on alienage 'are inherently suspect and are therefore subject to strict scrutiny *whether or not a fundamental right is impaired.*" *Id.* (emphasis added).

The University seeks to avoid this result by citing the Chief Justice's statement for the Court in *Foley* v. *Connelie*, *supra*, 435 U.S. at 295, that the exclusions in prior cases applying strict scrutiny, including *Nyquist*, "struck at the non-citizen's ability to exist in the community." The University then claims that only a "dollar differential, not a right to education, is at stake here" (Pet. Br. 23). In fact, however, as the Court recognized in *Foley* (435 U.S. at 295 n.4), the "necessity" referred to in *Nyquist* was the necessity of higher education itself, not of the aid to education involved. The actual benefits involved in *Nyquist*—namely, loans, tuition assistance, and scholarships in aid of higher education—are analytically indistinguishable from the financial benefits of lower tuition and fee rates at the

University of Maryland.[15] Moreover, the benefits of in-state status at the University of Maryland are not limited to a "dollar differential," but also encompass more lenient admission standards, which can be crucial to the students' ability to enter the University at all. In any event, as this Court recognized in *Nyquist*, classifications based on alienage are subject to strict scrutiny regardless of the nature of the underlying right or benefit in question.[16]

4. Fourth, the University asserts, without citation of precedent, that strict scrutiny should not apply here because its policy is "consistent with the purposes of federal immigration law," since "the Federal Government has no policy in favor of according educational benefits to nonimmigrants—in fact, just the opposite" (Pet. Br. 23, 24). First, this argument is really more of an attempted justification for the policy than a basis

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[15] The University claims that this case is different from *Nyquist* because denial of the scholarship assistance there could have denied the aliens in question a higher education (Pet. Br. 23 n.16). First of all, that is not necessarily true. Indeed, one of the forms of aid involved in that case was awarded without regard to need. See 432 U.S. at 2. In any case, the denial of in-state status here could have the same effect as the denial of benefits in *Nyquist*. Contrary to the University's suggestion (Pet. Br. 23), not all G-4 visaholders are professional employees; they also include clerical personnel and others, for whom the tuition differential could make a significant difference. Moreover, as noted in the text, in-state status also includes preference for admission, which can be critical to the students' ability to enter the University regardless of their financial standing.

[16] The Court in *Foley* recognized an exception to this rule where aliens are excluded from a "governmental function" involving "discretionary decision-making, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. See also *Ambach* v. *Norwick*, 441 U.S. 68 (1979). Obviously, no such "governmental function" is involved in the University's In-State Policy at issue here. Both *Foley* and *Ambach* preserved the continuing viability of *Nyquist* where aliens are denied access to state educational benefits. See 435 U.S. at 295; 441 U.S. at 73.

for determining what standard of scrutiny should apply to a state enactment. In any case, the simple answer to this contention is that, as this Court has made clear, "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8. See also *Mathews* v. *Diaz*, 426 U.S. 67, 79-87 (1976); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100-01 (1976). Thus, the fact that Congress or an appropriate federal administrative agency may have drawn certain lines respecting aliens in the distribution of benefits implies nothing about a State's power to act in a similar fashion.[17] Indeed, the Court in *Nyquist* made clear that it is not even permissible for a State to attempt to justify a policy on the basis of concerns relating to immigration or naturalization. 432 U.S. at 10.

For these reasons, the University has failed to offer a single persuasive argument in favor of reversing the holding of the courts below that the alienage-based classification created by the University's In-State Policy—*i.e.*, its treatment of nonimmigrant aliens domiciled in the State differently from citizens and immigrants domiciled in the State—is subject to the test of strict judicial scrutiny.

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[17] As a matter of fact, the University is in error in asserting that 42 U.S.C. § 1395o—the statute upheld in *Mathews* v. *Diaz*—drew a line "between nonimmigrants on one hand and citizens and permanent resident aliens on the other" (Pet. Br. 24). That statute conditions Medicare eligibility for aliens on both immigrant visa status *and* actual residence in this country for five continuous years immediately preceding application for benefits. Thus, it operates to deny benefits not only to nonimmigrant aliens but also to some immigrant aliens—*i.e*, those who fail to meet the durational residency requirement. Conversely, 45 C.F.R. § 177.201, also cited by the University (Pet. Br. 24), does not exclude all nonimmigrant aliens from eligibility for the low-interest student loans involved; it grants such eligibility to nonimmigrants who are in this country for other than a temporary purpose and who can show evidence of intent to become a permanent resident.

B. The Classification Created by the University's Policy Cannot Be Justified by the Interests Asserted To Support It.

In its initial appeal to the Fourth Circuit, the University expressly conceded that its In-State Policy "will not withstand a 'strict scrutiny' Equal Protection standard" (see P.A. 41a n.14). It evidently continues to concede that point since it makes no effort in its current brief to justify its policy under the strict-scrutiny standard of review and indeed states that it "has advanced only 'rational bases' for the exclusion of nonimmigrants from in-state benefits" (Pet. Br. 19). That concession is clearly correct. As noted above, under the strict-scrutiny standard, the State must show not only that its interest is substantial, but that the classification is necessary to the effectuation of that interest and is precisely drawn and precisely tailored to serve that interest. *E.g.*, *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, 605; *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 643; *San Antonio Indep. School District* v. *Rodriguez*, *supra*, 411 U.S. at 17. Our discussion below of the interests asserted by the University to support its policy makes clear that those interests cannot justify its treatment of G-4 and similar visaholders domiciled in Maryland under that exacting test. See pp. 23-27, *infra*.

In any event, even if this Court should hold, contrary to our argument, that the classification created by the University's policy is not subject to strict scrutiny, we submit that the interests asserted by the University are still insufficient to justify that classification under the "rational basis" test or whatever other standard of scrutiny the Court should decide to apply.[18] It must be reiterated that, despite the University's various repeated statements pertaining to the class of nonimmigrants generally, the discrimination worked by its policy falls only

[18] We note that the Supremacy Clause may require a strict scrutiny of the University's policy even if the Equal Protection Clause standing alone would not. See pp. 29-30, *infra*.

on the G-4 and similar visaholders who can be domiciled in Maryland. Thus, the affected class with reference to which the policy must be judged is not the nonimmigrant aliens who cannot be domiciled in Maryland—and who would thus fail to qualify for in-state benefits even if treated the same as citizens and immigrant visaholders—but rather the G-4 and similar nonimmigrant visaholders who would be capable of qualifying for in-state benefits if treated on an equal basis with citizens and immigrants. The exclusion of these visaholders from in-state benefits even if they could show domicile in Maryland cannot be justified under any equal protection analysis.

The first two interests asserted by the University to justify its policy are (1) limiting its expenditures by providing a subsidy to those more likely to contribute to the economic well-being of the State and the University, and (2) equalizing the cost of higher education between those who pay state income taxes and those who do not (Pet. Br. 26). Both of these interests are based on the assertion that nonimmigrant aliens do not pay the full range of state income taxes (see Pet. Br. 26-30).

First of all, the University's assertions regarding the lack of contribution of many categories of nonimmigrants—*e.g.*, temporary visitors and student (F) visaholders—are irrelevant, since, under *Elkins*, such visaholders are precluded by federal law from being domiciled in the United States and thus could not qualify for in-state status at the University in any event. See p. 4, *supra*. Of those in categories that can be domiciled in the State, some *are* subject to the full range of income taxes if they reside in the State—*e.g.*, treaty traders and investors (E visaholders) and foreign media representatives (I visaholders)[19]—contrary to the University's claim (Pet. Br. 27). Of course, G-4

[19] See, *e.g.*, Treas. Reg. § 1-871-1(a); Rev. Rul. 64-285, 1964-2 C.B. 184. Unlike G-4's, these visaholders do not have a general income tax exemption on their salaries under treaty or law.

visaholders, the class involved in this case, are exempt from income taxes on their salaries from the international organizations employing them, and it must therefore be that exemption that forms the basis for the University's attempt to justify their exclusion from in-state status even if domiciled in the State.

That exemption, however, is insufficient to justify the discrimination against these aliens, since, despite the existence of the exemption, the University's classification is not adequately related to its asserted interests. Although G-4 visaholders are exempt from federal and state income taxation on their official salaries by treaties or international agreements or by federal and state statutes (an exemption they cannot waive), they are subject to all other taxes, including real estate and sales taxes, as well as federal, state, and local income taxes on any income received by them other than the salaries paid them by the international organizations. For example, if their spouses work in this country, as they are specifically permitted to do, they must pay all income taxes on their compensation. See 8 C.F.R. § 214.2(g)(2). Thus, over a course of years, G-4 visaholders and their families domiciled in Maryland may have contributed far more to the State than a financially independent citizen student who has maintained a domicile in the State for the minimum six-month period required for in-state benefits. Indeed, this fact led the District Court in its initial decision to reject the University's asserted interest in cost equalization (P.A. 88a).

Moreover, the University makes no effort to classify citizens and immigrant aliens domiciled in Maryland on the basis of their tax liability or payments. It allows such a citizen or immigrant domiciled in the State to obtain in-state status regardless of whether—and the extent to which—he pays state income taxes and regardless of whether he has contributed little, if anything, to the State's income tax revenues. For example, citizens who derive all or a significant portion of their income from any one of a number of sources exempt from Mary-

land income tax[20] are nonetheless entitled to in-state status upon a showing of Maryland domicile. Furthermore, *immigrant* visaholders employed by public international organizations such as those employing the respondents' fathers are likewise exempt from federal and state income taxes on their salaries under the international agreements establishing those organizations. See p. 2, n.2, *supra*.[21] Yet, as this Court recognized in *Elkins*, the University has admitted that they could still obtain in-state status for their dependents upon a showing of domicile in Maryland. See 435 U.S. at 656-57 n.5 (P.A. 112a-113a n.5).

It is thus obvious that the University's classification at issue here is not drawn with enough precision, in terms of its interests in limitation of expenditures and cost equalization, to withstand the test of strict scrutiny. We further submit that that classification between citizens and immigrants domiciled in Maryland and G-4 and similar nonimmigrants likewise so domiciled is sufficiently

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[20] There are numerous such tax-exempt sources, some of which arise because Maryland law adopts the federal exclusions from adjusted gross income (Md. Ann. Code, art. 81, § 280(a)) and some of which arise from Maryland's own exclusions. These sources include, *inter alia*: social security and railroad retirement benefits (Treas. Reg. § 1.61-11(b)); workman's compensation (26 U.S.C. § 104(a)); life insurance benefits (26 U.S.C. § 101(a)(1)); federal, state, or local welfare payments (Rev. Rul. 57-102, 1957-1 C.B. 26); disability payments (within limits) under public or private retirement plans (26 U.S.C. § 105(d); Md. Ann. Code, art. 81, § 280(c)(10) (1981 Supp.)) or under police and fireman pension systems (*id.* § 280(c)(2)); payments (up to social security equivalent) under federal, state, or municipal retirement systems (*id.* § 280(c)(3)); and income from Maryland state or municipal bonds (26 U.S.C. § 103; Md. Ann. Code, art. 81, § 280(b)(1)).

[21] As noted there, immigrants employed by an international organization whose employees' tax exemption is established only by statute must waive the exemption or otherwise have their status adjusted to G-4; but where, as here, the organizations' income tax exemption is established by treaty or international agreement, that waiver requirement does not apply and immigrant employees are also entitled to the exemption. See Treas. Reg. § 1.893-1(c)(2).

arbitrary and irrational, in terms of those asserted interests, that it cannot be justified even under a less stringent equal protection standard.

The third justification asserted by the University to support its policy is its interest in administrative convenience and efficiency, particularly in avoiding "the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population" (Pet. Br. 30 n.24). That interest is clearly insufficient to justify the policy under the strict-scrutiny test. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 267 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 633-38 (1969). It is further insufficient in the present case to justify the policy even under a less strict test. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971). The University's argument is based on the assumption that, in the absence of the exclusion of all nonimmigrant aliens, it would face a great administrative burden. That premise is erroneous since most nonimmigrant students, including student (F) visaholders, are incapable as a matter of federal law of establishing domicile in the United States, and hence most of the University's "large nonimmigrant student population" need not be given individualized hearings on their domicile. See p. 4, *supra*. Such hearings would be required only for the G-4 and similar visaholders who can be domiciled in Maryland and who request the opportunity to show Maryland domicile. The University already has in place an administrative procedure for determining eligibility for in-state status on a case-by-case basis, and it uses that procedure to inquire into the domicile of citizens and immigrant aliens (P.A. 169a-170a). The University could easily use that existing procedure to consider domicile for the G-4 and similar nonimmigrants who wish to show Maryland domicile. There are relatively few nonimmigrant students who are capable of being domiciled in Maryland,[22] and providing

[22] For example, the record shows that there were only 68 G-4 visaholders registered at the University in the fall of 1978 and 72 in the fall of 1979 (J.A. 52A-53A). See also n.6, pp. 6-7, *supra*.

hearings for these students (even assuming that they all claimed Maryland domicile, which is unlikely) would hardly be a great administrative burden compared to the total requests for classification to in-state status.[23]

For these reasons, the interests asserted by the University to support the classification made by its In-State Policy cannot justify that classification either under a strict-scrutiny test or even under a less stringent equal protection analysis.

II. THE UNIVERSITY'S IN-STATE POLICY VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION.

The University's policy at issue here (both before and after the Clarifying Resolution of June 23, 1978) violates the Supremacy Clause for two reasons: (1) it impermissibly encroaches upon the exclusive federal authority over immigration; and (2) it interferes and conflicts with an objective of international agreements to which the United States is a party.

A. The University's Policy Constitutes an Impermissible State Intrusion into the Field of Immigration.

Under the Supremacy Clause, States may not encroach upon the exclusive federal power over, and policies involving, immigration and naturalization under federal law. *Graham* v. *Richardson, supra*, 403 U.S. at 376-80. While not every state enactment that deals with aliens is a regulation of immigration that is preempted, this Court's decisions have established certain principles governing when such a state enactment does become im-

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[23] The University also claims that, assuming that the disadvantaged class consists only of those nonimmigrants who can be domiciled in Maryland, a fourth interest supports its policy—"the prevention of disparate and unequal treatment between classes of nonimmigrants" (Pet. Br. 26 n.19). That interest must clearly fail, since the nonimmigrants harmed by the policy are in fact differently situated, with respect to domicile, from most nonimmigrant aliens, as this Court held in *Elkins*.

permissible under the Supremacy Clause. Thus, in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419 (1948), this Court explained:

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. [Citation omitted.] Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization *and residence* of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the* entrance or *residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration*, and have accordingly been held invalid." (Emphasis added.)

The Court further noted that all persons lawfully in the country have the right to abide in any State "on an equality of legal privileges with all citizens under nondiscriminatory laws." *Id.* at 420. Similarly, in *Graham* v. *Richardson*, *supra*, 403 U.S. at 378, 379, this Court indicated that where a state statute imposed "auxiliary burdens" not contemplated by Congress "upon the entrance or *residence* of aliens" lawfully within the United States, it was in conflict with the "overriding national policies in an area constitutionally entrusted to the Federal Government" (emphasis added). Again, in *DeCanas* v. *Bica*, 424 U.S. 351, 358 n.6 (1976), this Court stated that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." See also *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941); *C.D.R. Enterprises, Ltd.* v. *Board of Education*, 412 F. Supp. 1164, 1171-72 (E.D.N.Y. 1976), *aff'd sub nom. Lefkowitz* v. *C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977).

In *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, the Court discussed the relationship between these principles and those under the Equal Protection Clause:

> "The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first [is] based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment . . . . *The second, grounded in the Supremacy Clause*, Const., Art. VI, cl. 2, and in the naturalization power, Art. I, § 8, cl. 4, *recognizes the Federal Government's primary responsibility in the field of immigration and naturalization.*" (Emphasis added.)

The Court then went on, without distinguishing between these two bases, to hold that, while the States have some discretion in adopting enactments restricting benefits to aliens, "[i]n each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Id.* at 605.

Following this analysis, the District Court here noted that that standard "is essentially the strict-scrutiny analysis previously discussed in reference to the Equal Protection arguments"; and it held that since the University had failed to meet that standard in attempting to justify the discriminatory treatment of a class of aliens under its policy, that policy violated the Supremacy Clause as well as the Equal Protection Clause (P.A. 47a). This analysis is certainly warranted in view of this Court's decision in *Flores de Otero*. Contrary to the University's claim (Pet. Br. 32-33), it would not "automatically invalidat[e] on supremacy clause grounds every asserted discrimination against an alien subclass," but rather only those that do not meet the standard

enuciated in *Flores de Otero*. Moreover, that standard would apparently apply under the Supremacy Clause whether or not it applies for equal protection purposes.

The District Court's analysis, however, is not the only way to look at the question. We submit that, under the above-cited principles of this Court's decisions in *Takahashi*, *Graham*, and *DeCanas*, the University's policy should be held to be invalid under the Supremacy Clause —and the judgment of the courts below thus upheld— apart from any reliance on equal protection analysis.

What such decisions establish is that it is up to the Federal Government to decide the terms and conditions on which aliens will be admitted to this country and on which they reside in this country, and that once it has made that decision with respect to a particular class of aliens, the States may not impose additional discriminatory burdens on their residence in this country. Again, this does not mean that all state-imposed restrictions on aliens are impermissible. In some cases, for instance, the State may rely on *federal* law for purposes of making certain distinctions among aliens. Thus, for example, in the case of aliens who have not been lawfully admitted to the United States under federal law, the State would not necessarily violate the Supremacy Clause by *using* that federal-law decision to impose certain restrictions on those illegal aliens. See *DeCanas* v. *Bica*, *supra*. Similarly, in the case of lawfully admitted nonimmigrant aliens who are precluded by the terms of their visas under federal law from establishing a domicile in this country (*e.g.*, students holding F visas), a state university that bases in-state status on domicile would not violate the Supremacy Clause by relying on that federal law to adopt a general rule that such aliens could not obtain in-state status.

But where certain nonimmigrant aliens have been lawfully admitted to the United States and the terms of their visas permit them to establish domicile in this country, then the State ordinarily may not, on account of their

immigration status, deny them the benefits that it grants to all other domiciliaries of the State. Such action would appear to be justified only in exceptional circumstances, where the State is regulating in an area that is traditionally bound up with its operation as a sovereign political and governmental entity (such as defining the qualifications for voting or for serving as an official charged with formulating or executing public policy). See, *e.g.*, *Skafte* v. *Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. fed. ques.*, 430 U.S. 961 (1977) (upholding a ban on voting by aliens in school elections).[24] In the absence of such circumstances, the State may not subject such lawfully admitted aliens who can be and are domiciled in the State under federal and state law to restrictions that are not imposed on other state domiciliaries. To do so, as the University has done here, is

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[24] See also *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 642-43, 647-49; *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 11; *Foley* v. *Connelie*, *supra*, 435 U.S. at 295-96; *Ambach* v. *Norwick*, *supra*, 441 U.S. at 75. Cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 844-52 (1976).

Thus, the University can draw no support from its citation of *Ambach*, *Foley*, and *Skafte* for the proposition that this Court has on occasion "sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated" (Pet. Br. 33). Although *Ambach* and *Foley* involved equal protection, not Supremacy Clause, challenges, this Court made clear in those cases that the Constitution recognizes that the concept of citizenship "is fundamental to the definition and government of a State" and that thus the States have wider latitude than normal in limiting the participation of noncitizens in the States' political and governmental functions. *Ambach*, 441 U.S. at 75. See also *Foley*, 435 U.S. at 295-96. The rationale of this exception would also appear to apply for Supremacy Clause purposes. Indeed, in *Skafte*, the court considered and rejected a Supremacy Clause argument, stating that "[v]oter qualification is a primary example of an area which the states have historically occupied," and that Congress did not and could not "remove from the states the exercise of this power . . . with respect to local elections." 553 P.2d at 834. Of course, the University's policy in this case does not involve such a restriction on participation in the State's basic political or governmental functions.

to impose on the residence of such aliens in the United States discriminatory burdens not contemplated by Congress in admitting them, and is accordingly inconsistent with the exclusive federal authority to regulate immigration.[25]

The University argues, however, that these preemption principles do not apply to state action which disadvantages only nonimmigrant aliens and which does not involve a "necessity of life" (Pet. Br. 32). But as in equal protection context, the principles of this Court's Supremacy Clause decisions are not so limited. Obviously, Congress's regulation of immigration applies to nonimmigrants as well as immigrants, and hence state action can be inconsistent with it. Similarly, the principles of this Court's holdings that the States may not subject lawfully admitted aliens to discriminatory burdens not contemplated by Congress are not limited to burdens that affect what the University calls "necessities of life." The important fact for present purposes is that Congress has decided that the nonimmigrants in question can be domiciled in the United States and yet the University is treating them more harshly than any other state domiciliaries.

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[25] The United States appears to agree with this analysis since it has made a very similar point in its brief to this Court in *Plyler* v. *Doe* and *In re Alien Children Education Litigation* (Nos. 80-1538 and 80-1934):

> "Similar problems [under the Supremacy Clause] would arise under a state statute that rendered ineligible for certain generally available state programs nonimmigrants who are lawfully present in the United States for a temporary period. Where a nonimmigrant alien child's visa permits him to assume a residency in a state of such a character or duration that he would be entitled under state law to a free public education but for his status under the federal immigration laws, the state's denial of a free education to the child ordinarily would be inconsistent with the congressional judgment to admit the child and therefore invalid under the Supremacy Clause. Cf. *Elkins* v. *Moreno*, 435 U.S. 647, 658, 663-669 (1978); *Toll* v. *Moreno*, 441 U.S. 458 (1979)."

The University also claims that its policy is "harmonious with the federal scheme," since a federal regulation of the Department of Education, 45 C.F.R. § 177.201, "presently denies [certain federal] educational benefits [namely, low-interest loans] to G-4's and other nonimmigrants" (Pet. Br. 32 & n.25). But the Federal Government has the prerogative of adopting such restrictions. The States do not have that right when such restrictions are inconsistent with the federal policy embodied in the Immigration and Nationality Act that certain lawfully admitted nonimmigrants can be domiciled in the United States and thus, by implication, that if they are so domiciled, they should not be subjected *by the States* to discriminatory burdens not imposed on other domiciliaries (at least where, as here, the State's fundamental political or governmental sovereignty is not implicated).

For these reasons, we submit that the University's policy of excluding nonimmigrant visaholders domiciled in Maryland from the benefits of in-state status encroaches on the exclusive federal power over immigration and thus violates the Supremacy Clause regardless of the outcome on the equal protection issue.

B. The University's Policy Interferes With Objectives of International Agreements to Which the United States Is a Party.

In addition to violating the Supremacy Clause on the above ground, we submit that the University's policy, as applied to G-4 visaholders (such as respondents' fathers) who are exempt from income taxes on their international-organization salaries by virtue of international agreements to which the United States is a party, violates that clause by interfering with an objective of those international agreements.[26]

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[26] The District Court rejected this contention (P.A. 45a), and the Court of Appeals did not address it. We assert this argument here as an alternative ground for affirmance of the judgment below as to the G-4 visaholders with treaty-based tax exemptions.

There is no requirement that there be an overt inconsistency between the language of state and federal enactments in order for the state enactment to be invalid under the Supremacy Clause. It is sufficient if the state enactment "burdens or conflicts in any manner with any federal laws or treaties" or "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'" *DeCanas* v. *Bica*, *supra*, 424 U.S. at 357 n.5, 363 (quoting *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67). Such an obstacle is clearly present here. The international agreements establishing the organizations such as those employing respondents' fathers—agreements to which the United States is a party—preclude both the Federal Government and the States from levying income taxes on the salaries paid by the organizations to their non-U.S.-citizen employees. See Addendum A hereto. The Attorney General of the United States has issued an opinion indicating that this tax exemption is for the benefit of the international organizations and their member nations (including the United States),[27] that denial of that tax exemption would seriously embarrass the U.S. Government and could lead to retaliatory measures by other countries, and that thus the exemption is not subject to waiver by individual employees. 41 Op. Atty. Gen. 170, 172-73 (1954). Thus, the Federal Government has decided not only that the G-4 employees of these organizations can be domiciled in this country (as discussed above), but that they are to be exempt from federal and state income taxes on their official salaries.

The University's policy is inconsistent with that federal determination. The University subjects such G-4 employees domiciled in Maryland to restrictions not imposed

[27] This exemption—which applies equally to U.S. citizens employed by these organizations in other countries—benefits the organizations by, among other things, enabling them to pay salaries on a net-of-tax basis and by preventing any one country from benefiting through taxation from the required presence of the organizations' employees within its borders.

on other domiciliaries and attempts to justify that discrimination primarily on the basis that they are exempt from state income tax. Indeed, it emphasizes that the tuition differential at stake here is "an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year" (Pet. Br. 23). Thus, the University's policy of refusing to allow these G-4 visaholders domiciled in Maryland to obtain in-state status penalizes them on account of—and, in the University's own view, to the extent of—their partial income tax exemption granted by the international agreements. It thereby burdens, undermines, and interferes with the accomplishment of an important objective of those agreements, in violation of the Supremacy Clause.

In short, by treating G-4 visaholders who have treaty-based tax exemptions and who are domiciled in Maryland differently from other state domiciliaries, largely on account of their tax exemption, the University's policy is inconsistent with the federal determination that these visaholders are entitled *both* to be domiciled in this country *and* to be exempt from income taxes on their official salaries. That policy cannot stand under the Supremacy Clause.

III. THE UNIVERSITY'S IN-STATE POLICY, UNTIL JUNE 23, 1978, CREATED AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION, IN VIOLATION OF THE DUE PROCESS CLAUSE.

The Court need not reach this due process issue unless it disagrees with our position on both the equal protection and the Supremacy Clause issues. In that event, however, we submit that it should still uphold the limited decision of the lower courts that, until the Clarifying Resolution of June 23, 1978, the University's In-State Policy denied G-4 visaholders due process of law under the principles of this Court's decision in *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

A. *Vlandis* v. *Kline* Requires a Ruling That the University's Policy Violated the Due Process Clause Prior to June 23, 1978.

The basis of the lower courts' holding that the University's policy denied G-4 visaholders due process under *Vlandis* until June 23, 1978, is as follows: As in *Vlandis*, the University's policy purported to be concerned with domicile under state law as the test for in-state status, but it then denied to a group of individuals seeking to meet that test—G-4 and other nonimmigrant visaholders —any opportunity to prove that they did so, on the basis of a conclusive presumption that they could not have the requisite intent to establish Maryland domicile. As the courts found, that conclusive presumption was not universally true for G-4 visaholders, and so it denied them due process.

The University argues that while it supports the position that *Vlandis* should be overruled, "there are at least three theories under which this Court could reject the lower courts' irrebuttable presumption holding without overruling" *Vlandis* (Pet. Br. 34). Before discussing whether *Vlandis* should be overruled, we show the lack of merit of those three theories.

The University's first two theories are that the Court could (1) conclude that if the "policy is constitutional under the equal protection clause its operation is clearly permissible under the due process clause" (*id.*), or (2) "limit *Vlandis* to its precise circumstances" (*id.* at 35). The defect in both these theories is that they ignore the express holding of this Court in *Elkins* that, for due process purposes, this case is squarely governed by *Vlandis*:

> "Because petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi* [422 U.S. 749, 771 (1975)] to

> those situations in which a State 'purports[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' " 435 U.S. at 660 (P.A. 116a).

Thus, this Court has already decided that the validity of the University's policy (at least at that time) under the Due Process Clause is controlled by *Vlandis* (without regard to the equal protection issue) and that efforts to distinguish this case from *Vlandis* are not persuasive.

In its third theory, however, the University claims that this Court's subsequent decision in *Toll* in effect reversed its holding in *Elkins* and decided that *Vlandis* was inapplicable to this case and that no irrebuttable presumption ever existed, thus removing the issue from the case entirely and leaving the District Court to decide only the equal protection and Supremacy Clause issues (Pet. Br. 35-36). As the courts below recognized, that is a patent misreading of *Toll.*

In *Toll* this Court first took note of the Clarifying Resolution and stated that it appeared to remove the premise of *Elkins* that if G-4 visaholders could become Maryland domiciliaries, the University "would redraft its policy 'to accommodate' G-4 aliens . . . ." 441 U.S. at 461 (P.A. 160a). The Court then stated that "*if* domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . .' " 441 U.S. at 461-62 (P.A. 160a) (emphasis added). The Court did not decide *whether*, in light of the Clarifying Resolution, domicile was in fact any longer the "paramount" consideration; and it manifestly did not decide, as the University claims it did, that the resolution retroactively changed the "paramount" nature of domicile, and thus resolved the due process issue in the University's favor, for the period *prior to the date of the resolution.* The Court, in remanding, left those questions as among the "new is-

sues" to be "addressed in the first instance by the District Court." 441 U.S. at 462 (P.A. 160a).[28]

On remand, the District Court expressly found that until the Clarifying Resolution of June 23, 1978, the University's paramount purported concern in awarding in-state status under its policy "was with the Maryland law of domicile," and that "in-state eligibility hinged upon a determination of Maryland domicile according to *state law* principles" (P.A. 27a).[29] The court further found that the Clarifying Resolution did not retroactively change the University's paramount concern with domicile under state law for the period prior to that date, although it did for the period thereafter. The court therefore held that the due process issue was still governed by *Vlandis* for the period prior to June 23, 1978. The Court of Appeals agreed (P.A. 5a). That holding should be upheld (if the question is reached),

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[28] The University asserts that "if the Court thought that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be 'overrule[d] or further limit[ed]'" (Pet. Br. 36). That conclusion does not follow at all. This Court was faced with a new resolution which the University claimed showed a different basis for its In-State Policy from the one which the Court had previously found it had. The Court wanted to give the District Court the first opportunity to hear that claim and to address the questions of whether and how that resolution may have affected the issues. Furthermore, it seems highly unlikely that this Court would have decided that the June 23, 1978 resolution rendered *Vlandis* inapplicable, contrary to its prior decision, without full briefing on that question. See p. 6, *supra*.

[29] The University had, until the resolution, consistently and repeatedly represented that its In-State Policy was based on the state law of domicile and that the reason why it prohibited G-4 visaholders from proving domicile was that, in its view, they could not have the requisite intent to establish Maryland domicile. See Addendum B hereto. This Court in *Elkins* clearly recognized that domicile was the basis of the University's policy. 435 U.S. at 658-60, esp. n.8 & 9 (P.A. 114a-116a, esp. n.8 & 9).

since the lower courts' finding that domicile was the paramount concern of the University until June 23, 1978, is not clearly erroneous,[30] and since this Court's decisions in *Elkins* and *Toll* made clear that if domicile *was* found to be "the 'paramount' policy consideration of the University," then this case is to that extent still "squarely within *Vlandis* as limited by *Salfi*."

B. *Vlandis* v. *Kline* Should Not Be Overruled.

The *amici curiae* Alabama *et al.* (Br. 4-10) and American Council on Education *et al.* (Br. 5-8) urge this Court to use the present case as a vehicle to overrule *Vlandis*. Indeed, that appears to be the primary interest of these *amici* in this case. First of all, in view of the fact that the due process issue is no longer an important issue in this case, as it provides simply an alternative ground for the judgment below and one that is limited to a two-year period from 1976 to 1978, this is clearly not an appropriate case for this Court to reach out to overrule one of its prior decisions. If, however, the Court should, by rejecting our equal protection and Supremacy Clause arguments, have to reach the limited due process issue, we submit that it should not overrule *Vlandis*. In fact, the Court's holding in that case, as carefully limited by *Salfi*, represents a proper interpretation of the Due Process Clause.

The Court in *Salfi* properly drew a distinction between enactments that condition benefits upon compliance with a flat, objective eligibility criterion on which individuals can present evidence (such as that involved in that case) and enactments (such as that involved in *Vlandis*) that purport to be concerned with a particular factual test (*e.g.*, residency or domicile) in conditioning benefits and

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[30] This finding was a factual inference drawn from the undisputed facts, and the "clearly erroneous" standard applies to such inferences. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

then, on the basis of a conclusive presumption, deny certain individuals seeking to meet that test any opportunity to present and to have considered plainly relevant evidence of the fact deemed crucial. See 422 U.S. at 771-72. This Court's decisions and sound constitutional principles demonstrate that where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to certain state benefits, its use of a conclusive presumption to deny to a certain class of people the opportunity to prove that fact, when that presumption is not universally true, denies that class procedural due process unless the State's difficulties in determining the crucial fact through individual hearings would outweigh the individuals' interests affected. See, *e.g.*—in addition to *Vlandis* and *Salfi*—*Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 518 (Marshall, J., concurring), 524 (Rehnquist, J., dissenting) (1973).[31]

Of course, this does not mean that courts should go in search of such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function and would, in the language of *Salfi*, turn the irrebuttable-presumption doctrine into a "virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 772. But where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has conclusively presumed the existence of that fact from another fact, which is not otherwise the subject of the legislative concern, then principles of procedural due process require a careful scrutiny of the enactment. Such a conclusive presumption can be justified only if

[31] The precedential and constitutional underpinnings of this principle are discussed at length in our brief in this Court in *Elkins*. Brief for Respondents in No. 77-154, at 41-66.

the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individuals' interests affected. Otherwise, the denial of an individualized hearing on the fact deemed crucial is a denial of due process.

This analysis is not, as the *amici* suggest (Br. of Ala. *et al.* 5, 8; Br. of Amer. Coun. on Educ. *et al.* 6), a resurrection of the substantive due process concepts of the early part of this century. As the Court recognized in *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652, this analysis scrutinizes means, not ends. It does not in any way prohibit or limit the State's ability to pursue certain stated objectives. Rather, it simply focuses on the means the State uses to achieve its objective and ensures that when the State conditions benefits on a particular fact, it does not without very good reason deny people's right to introduce, and to have duly considered, relevant evidence regarding that fact.[32]

Application of the *Vlandis* doctrine under this analysis is consistent with the subsequent decisions of this Court cited by the University and the *amici*.[33] It has also been

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[32] The *amici*'s claim that the challenged in-state scheme in *Vlandis* created no "property" or "liberty" interest deserving of due process protection (Br. of Ala. *et al.* 8; Br. of Amer. Coun. on Educ. *et al.* 6) is erroneous. The "property" interests necessary to invoke the due process guarantee include the concept of "entitlements" under the enactments involved (see *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)); and it is the very point of the analysis here that the State has created a particular factual test (*e.g.*, residency or domicile) as the basis for the entitlement to benefits, but then has deprived certain people of that entitlement. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 166-67, 177-78, 210-11 (1974). Furthermore, the in-state policies in *Vlandis* and this case created a "liberty" interest in in-state status for those who were determined to be resident or domiciled in the State, but then burdened that interest by denying certain individuals who could meet that test any opportunity for a hearing on that question. Cf., *e.g.*, *Vitek* v. *Jones*, 445 U.S. 480, 488-91 (1980).

[33] Those cases generally involved flat objective requirements, like that in *Salfi*, on which individuals could present evidence—not ir-

recognized by several commentators as a principled and useful constitutional interpretation,[34] and the due process principle underlying it has been applied by this Court in

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rebuttable presumptions purporting to be concerned with a particular fact and then precluding inquiry into that fact. For example, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979), involved a flat prohibition on transit employees from using drugs, including methadone. *Vance* v. *Bradley*, 440 U.S. 93 (1979), involved a flat objective requirement that persons covered by the Foreign Service retirement system retire at age 60. *Friedman* v. *Rogers*, 440 U.S. 1 (1979), involved a flat requirement that 4 of the 6 members of the state optometry board be members of the state optometric association. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), struck down, under the First Amendment, a Massachusetts statute forbidding banks to spend money to influence votes except under certain conditions. That statute had been construed by the Massachusetts Supreme Judicial Court in such a way as to remove any claim that a conclusive presumption was involved. *Id.* at 772. *Ohio Bureau of Empl. Serv.* v. *Hodory*, 431 U.S. 471 (1977), involved a flat statutory rule that disqualified a worker from unemployment benefits if his unemployment was due to a labor dispute other than a lockout. That statute did not create any irrebuttable presumption. The other cases cited by the University (Pet. Br. 34) likewise involved such flat objective rules or exclusions. The only possible exception is *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which involved a federal statute providing that if a miner had complicated and incurable black lung disease, he was deemed to be totally disabled and thus entitled to compensation. But that was not an irrebuttable presumption in the mold of those in *Vlandis* and *Stanley*, because in enacting that statute, Congress was not only concerned with the ultimate fact—total disability—but was equally concerned with the proximate fact or trait—complicated and incurable black lung disease. Indeed, "it was precisely this [latter] advanced and progressive stage of the disease that Congress sought most certainly to compensate." *Id.* at 23.

[34] See L. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269, 287 (1975); B. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. Pa. L. Rev. 761 (1977); J. Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 705 (1976).

other areas of the law.[35] Hence, if the question is reached at all, *Vlandis* should be preserved as applied under this analysis.

IV. THE LOWER COURTS' HOLDING THAT REFUNDS ARE APPROPRIATE BECAUSE THE UNIVERSITY WAIVED ITS ELEVENTH AMENDMENT IMMUNITY WAS CORRECTLY BASED ON THE UNIVERSITY'S REPRESENTATIONS IN THIS CASE.

The District Court's order of May 30, 1980, besides reaffirming injunctive relief against enforcement of the University's In-State Policy, ordered the University to refund the difference between out-of-state and in-state charges to each class member whose status was determined by a G-4 visa for the fall semester of 1976 or for any subsequent semester and who would have been reclassified to in-state status but for the District Court's stay of its original order of July 13, 1976, pending appeal (P.A. 49a ¶ 6). The University's contention that this order violates the Eleventh Amendment was properly rejected by both courts below on the basis of the representations made by the University to obtain a stay of the original 1976 order.

The original order of July 13, 1976 (P.A. 98a) gave prospective relief only and thus raised no Eleventh Amendment issues. Had that order not been stayed, the University would immediately have had to cease charging affected class members the higher out-of-state tuition rates. Conversely, had a stay been granted without conditions, the University might have a valid argument that the Eleventh Amendment barred the District Court in 1980 from ordering refunds back to 1976. In fact,

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[35] For example, in administrative law, it is established that, even where an agency is not required to adopt a particular rule, once it does so it is bound by the Due Process Clause to follow that rule in a particular case. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

however, the 1976 order was stayed after a motion by the University in which it represented specifically that "[p]laintiffs will not suffer substantial harm if a stay is granted" (R. 439), and after an oral hearing at which the University's counsel made the representation, incorporated into the stay order itself, that in the event the court's injunctive order was "finally affirmed on appeal," the University would refund the relevant difference in tuition to "each student whose status is currently determined by a G-4 visa and whose request for reclassification . . . would have been granted but for the stay" (P.A. 99a-100a). The obvious intent of this stay order was that, while the University took its appeal, it could continue to charge the respondent class out-of-state tuition rates, but that if the appeal was not successful, it would have to make affected class members whole, back through the fall semester of 1976. The court's order of May 30, 1980, merely implemented the terms of that stay order.

The University does not deny that the condition attached to the original stay order was an express waiver of Eleventh Amendment immunity. Rather, it argues (in its "first" and "third" points, Pet. Br. 37-38, 38-39) that the District Court's 1976 order was "effectively vacated" when this Court in *Toll* vacated the judgment of the Court of Appeals, and that thus that order can never be "finally affirmed on appeal" within the meaning of the original stay order. In addition, it argues (in its "second" point, Pet. Br. 38) that, in any event, refunds for the period 1976 to 1978 are inappropriate. Both arguments are without merit.

1. The University's contention that this Court in *Toll* "effectively vacated" the 1976 order is inconsistent with the Court's language and with the logic of the situation. Respondents were defending the 1976 order in this Court on the due process ground that had been adopted by the courts below *and* on the equal protection and Supremacy Clause grounds that neither court had ad-

dressed. As shown above (pp. 37-38), this Court did not decide the due process question in the University's favor; and it plainly did not decide the equal protection and Supremacy Clause issues. Rather, it simply concluded that the intervening Clarifying Resolution raised "new issues of constitutional law which should be addressed in the first instance by the District Court." 441 U.S. at 462 (P.A. 160a). Accordingly, it "vacate[d] the judgment of the Court of Appeals"—not the judgment of the District Court—and "remand[ed] to the District Court for further consideration" in light of its opinion in *Elkins*, the Maryland Court of Appeals' opinion, and the Clarifying Resolution. *Id.* This Court thus left it up to the District Court to decide whether, in light of the resolution, the due process ground still justified the injunction and, in any event, whether the equal protection or Supremacy Clause arguments did so. It surely would not have vacated the 1976 order—and deprived respondents of rights accruing under it—without addressing the various alternative grounds supporting it.

The University's contention that the case could not have been remanded for reconsideration without vacating the 1976 order (Pet. 27) ignores the broad authority granted by 28 U.S.C. § 2106[36] and the fact that this Court has often remanded cases for reconsideration without vacating the underlying order or judgment. *E.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 111-12 (1976), and *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961).[37] Accordingly, the 1976 order was "finally

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[36] "The Supreme Court . . . may . . . require such further proceedings to be had as may be just under the circumstances."

[37] The University cities *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 268 (1936), for the proposition that an appellate court cannot leave in effect the final decree of a district court and at the same time reinvest that court with jurisdiction to retry the case (Pet. Br. 37-38). But the statement in question was limited to the peculiar facts of that case, where the court of appeals had

affirmed on appeal" when the District Court reaffirmed that order (though in part on different legal grounds) in 1980, or will be "finally affirmed on appeal" if the judgment below is affirmed here.[38]

If the University's position were correct, the result would be illogical and unfair. If this Court affirms the judgment below on the invalidity of the In-State Policy, then in *not one court* will the University have prevailed on the merits. The 1976 order will have been upheld as properly entered. It is incredible, under these circumstances, that the University should contend that it cannot now or ever be ordered to pay the money it expressly promised in 1976 to refund, if necessary. The upshot of this argument is that the University won the entire case up to May 30, 1980, regardless of the decision on the substantive issues, since it can never be ordered to pay back the monies collected between the original order and that date. Both the District Court, which had heard argument on and signed the original stay order, and the Court of Appeals, which had adopted that stay order when it stayed its own mandate (P.A. 103a-104a), properly rejected this unreasonable inter-

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issued an ambiguous remand order which had been misunderstood by the district court. No stay of the district court order had been issued in that case, and there was no issue, as here, of rights that might be lost by virtue of the Eleventh Amendment if the district court order were vacated. In any event, that decision preceded the enactment of 28 U.S.C. § 2106, as well as the adoption of Rule 60, Fed. R. Civ. P., which allows a district court to reconsider a matter without upsetting its original order.

[38] Since the District Court stayed the 1980 order pending appeal on the same grounds as it had stayed the 1976 order (P.A. 52a; see also P.A. 3a-10a), there is little practical difference between the two approaches. The first approach makes sense because (a) the further District Court proceedings were mandated by this Court and thus may be considered a continuation of the initial appeal and (b) neither this Court nor the Court of Appeals retained jurisdiction of the case, so a new appeal had to be taken by the University from the 1980 order.

pretation of the order; and the University's continued effort to escape the manifest intent of its representations should not be countenanced by this Court.

2. Finally, the University suggests that, at the very least, refunds for the period after June 23, 1978, should not have been ordered, because "the in-state policy had been declared constitutional on due process grounds after that date . . . and was not declared unconstitutional on different grounds until May 30, 1980" (Pet. Br. 38). This argument, made without any citation of authority, ignores the procedural posture of the case and was properly rejected by both courts below.

The District Court declared the In-State Policy unlawful and enjoined its application in 1976. The fact that the legal ground announced at the time—due process—was later changed for the period after June 23, 1978—to equal protection and supremacy—is irrelevant. Respondents were entitled to defend that 1976 order on any legal grounds that supported it (see, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 397 n.16 (1979)), and they did so. An order that is later affirmed on different grounds still stands from the time it was entered.

The University's argument might make sense if the University had in 1978 adopted a *new* in-state policy that was no longer covered by the 1976 order. But the University admits that the Clarifying Resolution did not change the In-State Policy or result in a new policy (Pet. Br. 8, 37), and the resolution itself states that it "reaffirms" the original In-State Policy (P.A. 174a ¶ 4).[39] Ac-

[39] Although the District Court, in finding that the policy did not create an impermissible irrebuttable presumption after June 23, 1978, did speak of a "revised In-State Policy" (P.A. 28a), those words must be understood in the irrebuttable-presumption context, where the critical issue is the " 'paramount' concern" of the policy (P.A. 24a). In any event, since the District Court later considered (J.A. 84A, 85A-86A ¶ 6) and rejected (P.A. 49a ¶ 6) the possibility of not ordering refunds for the period from June 23, 1978, to May 30, 1980, the court necessarily rejected the contention that the Clarifying Resolution took the In-State Policy out from under the July 13, 1976 injunction.

cordingly, since the In-State Policy before and after June 23, 1978, was subject to the 1976 order, the University must make refunds for the entire period after that order (if it does not prevail in this Court), because it waived Eleventh Amendment immunity by agreeing to the conditions in the stay order of August 3, 1976.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDA

ADDENDUM A

International Organizations Located in the United States to Which the G-4 Visa Category Applies, and Whose Alien Employees Have, Under Treaties or International Agreements, Exemptions from Federal and State Income Tax on Their Official Compensation [1]

Inter-American Development Bank:

Agreement Establishing the Inter-American Development Bank, *done* April 8, 1959, art. XI, sec. 9(b), 10 U.S.T. 3029, T.I.A.S. No. 4397 (entered into force December 30, 1959) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals.").

International Bank for Reconstruction and Development (World Bank) (and its affiliated organizations):

Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* December 27, 1945, art. VIII, sec. 9(b), 60 Stat. 1440, T.I.A.S. No. 1502 (entered into force December 27, 1945) ("No tax shall be levied on or in respect of salaries of employees of the Bank who are not local citizens, local subjects, or other local nationals."), incorporated in 22 U.S.C. § 286h.

Articles of Agreement of the International Finance Corporation, *done* May 25, 1955, art. VI, sec. 9(b),

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[1] A listing of all the international organizations to which the G-4 visa category applies—or would apply if the particular organization had an office or staff in the United States—appears in 9 Department of State, *Foreign Affairs Manual* § 41.50, Exhibit I (pages dated 3/26/81 & 10/1/80), an earlier edition of which is reprinted in 6 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 41.50 at 32-105 to 32-107 (1981). See also Historical Note following 22 U.S.C.A. § 288 (West 1979 & 1981 Supp.) (organizations entitled to privileges and immunities under the International Organizations Immunities Act).

7 U.S.T. 2197, T.I.A.S. No. 3620 (entered into force July 20, 1956) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Corporation to . . . employees of the Corporation who are not local citizens, local subjects, or other local nationals.").

Articles of Agreement of the International Development Association, *done* January 26, 1960, art. VIII, sec. 9(b), 11 U.S.T. 2284, T.I.A.S. No. 4607 (entered into force September 24, 1960) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Association to . . . employees of the Association who are not local citizens, local subjects, or other local nationals.").

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (creating the Centre for the Resolution of Investment Disputes), *done* March 18, 1965, art. 24, sec. 2, 17 U.S.T. 1270, T.I.A.S. No. 6090 (entered into force October 14, 1966) ("Except in the case of local nationals, no tax shall be levied . . . on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.").

International Monetary Fund:

Articles of Agreement of the International Monetary Fund, *opened for signature* December 27, 1945, art. IX, sec. 9(b), 60 Stat. 1401, T.I.A.S. No. 1501 (entered into force December 27, 1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to . . . employees of the Fund who are not local citizens, local subjects, or other local nationals."), incorporated in 22 U.S.C. § 286h.[2]

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[2] Three other organizations to which the G-4 visa category would apply—the African Development Fund, the Asian Development

United Nations:

> Convention on the Privileges and Immunities of the United Nations, *done* February 13, 1946, art. V, sec. 18(b), 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force April 29, 1970) ("Officials of the United Nations shall . . . be exempt from taxation on the salaries and emoluments paid to them by the United Nations"; U.S. ratification subject to reservation providing that U.S. retains the right to tax salaries paid to United States nationals, and aliens admitted for permanent residence.).[3]

Bank, and the Customs Cooperation Council—have similar tax exemptions under treaties or international agreements, but we understand that these organizations do not have offices or staff in the United States. For the text of these tax exemptions, see Agreement Establishing the African Development Fund, *done* November 29, 1972, art. 49, para. 4, 28 U.S.T. 4547, T.I.A.S. No. 8605 (entered into force November 18, 1976); Agreement Establishing the Asian Development Bank, *done* December 4, 1965, art. 56, para. 2, 17 U.S.T. 1418, T.I.A.S. No. 6103 (entered into force August 22, 1966); Convention Establishing a Customs Cooperation Council, *done* December 15, 1950, Annex, art. VI, sec. 17(b), 22 U.S.T. 320, T.I.A.S. No. 7063 (entered into force November 5, 1970).

[3] This Convention on the United Nations thus provides an exception to the general rule, cited in the text of this brief (p. 2, n.2, & p. 25, n.21), that *immigrant* visaholders employed by international organizations with a treaty-based tax exemption are also entitled to that exemption.

The University incorrectly states that G-4 employees of three other organizations—the International Coffee Organization, the North Atlantic Treaty Organization, and the International Court of Justice—have treaty-based tax exemptions (Pet. Br. 29 n.22). The treaty establishing the International Coffee Organization contains no exemption for employees from taxation by the United States or its subdivisions. See International Coffee Agreement, 1976, *done* December 3, 1975, art. 23, para. 2, 28 U.S.T. 6401, T.I.A.S. No. 8683 (entered into force August 1, 1977). As to NATO and the International Court, neither organization is one to which the G-4 visa category applies. See lists cited in note 1 of this Addendum, *supra*.

ADDENDUM B

The University's Representations Regarding Domicile as the Basis of the University's In-State Policy Prior to June 23, 1978

1. *Representations in the Initial Proceedings in the District Court*

In describing the University's In-State Policy:

> "The Defendant University *distinguishes between domiciliaries and non-domiciliaries* of the State of Maryland in the amount of tuition, room and other miscellaneous charges assessed." R. 215 (emphasis added).

> "[The structure of the In-State Policy] incorporates the determination that *under the law and definition of domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile." R. 217 (emphasis added).

> "[Each plaintiff was] classified as an 'out-of-state' student because his [or her] father, upon whom he [or she] is financially dependent, is not domiciled in Maryland." R. 220.

In responding to the plaintiffs' irrebuttable-presumption argument:

> "Defendants have denied Plaintiffs 'in-state' status *based on an evaluation of their domicile under Maryland law*: the existence of a G-4 visa is merely a single operative fact, *albeit paramount, which is placed in the context of what Defendants have determined to be the definition of domicile established by the Maryland courts.*" R. 231 (emphasis added).

In responding to the plaintiffs' equal-protection argument:

> "[T]he most cursory examination of the In-State policy shows that it is *predicated upon the test of domicile*, and cuts squarely across the issue of alienage." R. 232 (emphasis added).
>
> "This distinction [between citizens and immigrant aliens, on the one hand, and non-immigrant aliens, on the other,] was *based upon a reading of the Maryland law of domicile* in conjunction with the terms and conditions of the non-immigrant visas described in 8 U.S.C. § 1101(a)(15)(A) through (L), a determination thereby having been made that non-immigrants do not have the intent requisite for establishing Maryland domicile. This distinction in the 'In-State' policy thereby clearly relates to *the overlying purpose of the policy which is to grant in-state status . . . to domiciliaries of this State.* That State University's [*sic*] can establish such 'residency' or 'domicile' policies and make distinctions between domiciliaries and non-domiciliaries is well established and beyond dispute." R. 233 (emphasis added).
>
> "[T]he Defendants' 'In-State Policy' creates two classes of persons, indistinguishable except with respect as to whether they are or are not domiciliaries of Maryland. The same test, *the test of domicile*, is applied to all persons, citizens and aliens (including 'G-4' aliens) alike." R. 334 (emphasis added).

In arguing that the plaintiffs had no standing to sue:

> "[T]he relevant issue in the determination of [plaintiffs'] 'out-of-state' status was the domicile of their respective fathers." R. 238.

In arguing that the District Court should abstain from deciding the unresolved "core" question whether G-4

visaholders could establish domicile in the State under Maryland law (R. 239-43, R. 340):

> "[T]he Defendants' 'In-State Policy' is structured upon and reflects Defendants' understanding of the Maryland common law of domicile." R. 340.
>
> "A judicial determination in the negative [by the Maryland courts on the question whether G-4 visaholders could be domiciled in Maryland] would foreclose their Constitutional and statutory arguments; *a determination in the affirmative would require the University's Board of Regents to rewrite the In-State policy to accommodate this category of domiciliaries.*" R. 240 (emphasis added).

In the conclusion to its Reply Memorandum:

> "[T]he Defendants' 'In-State Policy' was undisputably based on the 'nonsuspect' criteria of domicile." R. 345.

2. *Representations in the Court of Appeals on the Initial Appeal (No. 76-2049)*

Describing the University's In-State Policy:

> "Under what is basically a two-step determination, the University will grant in-state status only 'to United States citizens and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States.' . . . For students . . . who are not United States citizens or permanent resident aliens or financially responsible parents holding similar non-immigrant status, the University does not further examine other domiciliary factors such as whether or not such individuals pay taxes. . . . This is because individuals who do not meet the first step of the process *cannot have the requisite intent to establish Maryland domicile.*" Appellant Br. 4-5 (emphasis added).

In responding to the appellees' equal-protection arguments:

> "[T]he challenged classification is one *based on domicile* rather than alienage." Appellant Reply Br. 14 (emphasis added).

In arguing that the District Court should have abstained:

> "[T]he principal issue in the case . . . [was] whether a G-4 visa holder can establish domiciliary intent . . . ." Appellant Br. 18.

> "If state courts hold that Maryland's law of domicile does not preclude a G-4 alien from establishing domiciliary intent for tuition purposes, the University will have to weigh other domiciliary indicia such as those eight set forth in the In-State Policy and determine the status of the students on that basis. This is precisely the relief ordered by the lower court—but without the adjudication of a federal constitutional issue." Appellant Br. 16-17.

3. *Representations in this Court in Elkins* v. *Moreno* (*No. 77-154*)

In describing the In-State Policy:

> "Like most other public institutions of higher education, the University of Maryland *bases its award of in-state status on domicile.*" Petitioner Br. 11 (emphasis added).

> "Because it views *nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland*, the University awards in-state status only to 'United States citizens and . . . immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States.'" *Id.* (emphasis added).

In the Summary of Argument:

> "[The In-State Policy] is *predicated upon domicile* . . . ." *Id.* at 17 (emphasis added).

In answering the respondents' irrebuttable-presumption argument:

> "[T]he University's in-state policy . . . *is directed at* and disadvantages *only nondomiciliaries* . . . ." *Id.* at 30 (emphasis added).
>
> "The University's in-state policy *tracks the State's law of domicile* to classify nonimmigrant aliens as nondomiciliaries." *Id.* at 34 (emphasis added).

In answering the respondents' equal-protection argument:

> "In terms of the benefit denied by the classification, it is *predicated essentially on domicile* with aliens on both sides of the classification." Petitioner Reply Br. 13 (emphasis added).

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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
Petitioners,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

INTRODUCTION

In a long brief marked with legal and factual inaccuracies and inconsistencies,[1] the student-respondents have

[1] Although denied permission to exceed the 50-page limitation of Rule 34 the respondents have filed a 48-page brief with 42 footnotes and eight-pages of "addenda" containing additional

striven to reformulate the issues in this case to their liking. However, no amount of words can disguise the basic unfairness of the positions advanced by the bank students (and the international banks that have been the real parties in interest throughout this litigation)[2] or the unsoundness of the legal principles they urge upon the Court.

The key issue in this case is whether, *as a general legal proposition*, a state classification disadvantaging nonimmigrants, who in many respects are exempt from the burdens imposed upon citizens and resident aliens, must be gauged by the strict scrutiny equal protection standard. If strict scrutiny is not the standard, the Court must decide if, *under the facts of this particular case*, the University of Maryland's policy of denying in-state tuition and fees to nonimmigrant aliens is rationally related to a legitimate end. Contrary to the suggestions of the international bank students, the determination of the latter issue does not turn on whether the classification established by the University is precise or perfect. Rather, the inquiry is "whether the restriction reaches so far and is so broad and haphazard" as to belie the University's claimed rational bases. *See Cabell v. Chavez-Salido*, 50 U.S.L.W. 4095, 4097 (U.S. Jan. 12, 1982).

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argument. The petitioners will not add unnecessarily to the overabundance of materials before the Court and, for this reason, have prepared summary responses to most of the international bank students' contentions and have included them in an appendix to this reply brief.

[2] Throughout this litigation, the nominal respondents have pursued this case at the instance of, and financed by, the International Bank for Reconstruction and Development ("the World Bank") and the Inter-American Development Bank ("the IDB"). Now, after almost seven years, during which numerous opinions have been written in this case including two by this Court, the two parties plaintiff in this case — the World Bank and the IDB — have appeared for the first time, as *amici curiae* in support of the respondents.

The petitioners submit that in this case, at the very least, their interest in equalizing the costs of a University education between those who have and those who have not fully contributed to its support through income tax contributions or otherwise is eminently rational when "judged by reference to characteristics typical of the affected classes." *Califano v. Jobst*, 434 U.S. 47, 55 (1977).

That is not to say that every state classification disadvantaging nonimmigrant aliens can necessarily be similarly justified even under a rational basis standard. For example, a state ban on the holding of *all* civil service jobs by nonimmigrants premised on a lack of tax contributions rationale might fail because the State, for the most part, could tax the earnings of such persons from state employment. And an attempt by the State to charge nonimmigrant alien children public school tuition purportedly justified on a tax contribution theory might fall because the primary source of funds for public school education in Maryland is the local property tax to which nonimmigrants may contribute.[3] However, because the operation of the University of Maryland is funded primarily from income tax revenues and because nonimmigrants generally and G-4 aliens especially do not pay their full share of the state income tax, the line drawn by the University should stand.

The purpose of this reply brief is to dispel whatever confusion the international bank students have created on the equal protection and due process issues in this case and to respond to the alternate ground advanced by the students and the international banks that the University's

[3] Of course, nonimmigrants are not barred from state employment in Maryland. And all individuals present in Maryland, regardless of citizenship or domicile (including nonimmigrants and illegal aliens), have a right under the state constitution to a free public school education. *See David M. Armour, et al. v. Board of Education of Montgomery County, Maryland*, No. 79-10, Maryland State Board of Education (Sept. 14, 1979).

in-state policy somehow interferes with the international agreements entered into by the banks.

I.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT DISCRIMINATE AGAINST A SUSPECT CLASS AND IS RATIONALLY SUPPORTED BY IMPORTANT STATE INTERESTS.

The University's in-state policy is not directed at resident aliens; nor does it harm them. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).[4] Indeed, its exclusions are not solely aimed at nonimmigrants. Numerous citizens are disadvantaged by the policy.

The international bank students misread the policy when they contend that the University inquires into the domicile of members of the Armed Forces assigned to the University for educational purposes. *See* Brief for Respondents at 12-13 n.7. On its face (P.A. 168a) and as administered, the policy excludes such persons from benefits.[5] In addition, the effect of the policy is to deny in-state benefits to large groups of citizens, *e.g.*, out-of-state residents. *See* Brief of Petitioners at 4-5.

But even if the policy were limited in its exclusionary effect to nonimmigrant aliens, this does not mark the

[4] Both *Mauclet* and *Graham v. Richardson*, 403 U.S. 365 (1971) involved state classifications that theoretically imposed no absolute ban to all aliens but as a practical matter disadvantaged the entire class and, most importantly, all permanent resident aliens.

[5] It is interesting that after almost seven years of litigation, during which the University has consistently pointed to the policy's exclusion of Armed Forces personnel assigned to attend the University by the military (*see, e.g.*, Transcript of Argument before this Court on Feb. 22, 1978, at 4), the respondents would suggest for the first time a tortured reading of the policy — inconsistent with commonsense and how the policy is administered — to assert that such military personnel are not excluded automatically as are nonimmigrants.

classification for strict scrutiny. Even the lower courts did not hold "nonresident aliens" to be a suspect class deserving of heightened protection, *see Moreno v. Toll*, 489 F. Supp. 658, 663 (D. Md. 1980), a conclusion the respondents now challenge. Brief for Respondents at 15-16. The decisions below simply and erroneously found nonimmigrant aliens to be "resident aliens" within the meaning of this Court's alienage equal protection cases.

However, both the use of the term "resident alien" by this Court and the rationale of its equal protection cases demonstrate the error of this position. A "resident alien" is not an alien who is simply "present and dwelling" in the United States, as the district court held, 489 F. Supp. at 663 n.8, or an alien who can establish domicile in this country and in the State, as the international bank students argue in the alternative.[6] *See* Brief for Respon-

[6] When this case was last argued before this Court, in 1978, Justice Stevens engaged in the following colloquy with counsel for respondents on the contention that domicile could be the only constitutional basis for the University's policy (Transcript of Argument, Feb. 22, 1978, at 36-37):

> QUESTION: Isn't it true that the university is entitled to draw some line and when you get real close to that line, it's going to have an appearance of arbitrariness.
>
> MR. SCANLAN: Well, the university is entitled to draw the line that is drawn, namely, domicile. What it is not entitled to do—
>
> QUESTION: Why isn't it entitled to draw the line at permanent resident just the way the first paragraph of their general policy does? Immigrant aliens lawfully admitted for permanent residence.
>
> MR. SCANLAN: Because there you are right back on the equal protection point. The *Mathews v. Diaz* case, written by you Honor, involved the Federal power. And the Court, speaking through you, Mr. Justice Stevens, made it perfectly clear in that case and again in *Nyquist* the Federal Government can have powers of classification over aliens and subclasses of aliens that is denied the States, because the Federal power is also based on the foreign relations policy of this country, which is none of the

dents at 16. A "resident alien" is one who bears so many of the burdens associated with citizenship that it is irrational to deny him the benefits accorded citizens. Resident aliens, like citizens, pay their full share of taxes, support the economy, serve in the armed forces, and obey our laws. Thus, "[i]t is appropriate that a State bear a heavy burden when it deprives them of [benefits]." *In re Griffiths*, 413 U.S. 717, 722 (1973).[7] In essence, the characteristics of resident aliens are the very rationale of strict scrutiny.

Nonimmigrant aliens as a general proposition do not pay their full share of taxes. Some are simply not in the country long enough to contribute significantly to a state's economy. Others, like the parents of the respondents, are the beneficiaries of significant income tax advantages.[8] All nonimmigrants are exempt from mandatory draft registration. 50 U.S.C. § 453. And, to a degree, certain nonimmi-

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business of the States, much less the University of Maryland.

QUESTION: That really doesn't respond to the question, because I think you would concede that the university would not have to admit all aliens, say, illegal aliens or persons here on temporary visas. You wouldn't contend that.

MR. SCANLAN: No. I would concede there are classes of aliens that the university would be entitled to say, "Well, on your face you cannot show your domicile is here. Your visa says you have an intention—

QUESTION: But the Constitution doesn't require domicile to be the test.

[7] This language in *Griffiths* undercuts the students' contention that this Court has only focused on the characteristics of resident aliens when determining whether a state interest justifying discrimination against aliens is "compelling".

[8] The international bank students' suggestion that E visa holders do not share the tax advantages afforded most categories of nonimmigrants, even if true, would not, of course, undercut the truth of the general proposition or render substantially overinclusive the university's classification. Moreover, Revenue Ruling 64-285 accords E-visa holders the benefits of 26 U.S.C. § 871 for one year.

grants, such as diplomats and employees of international organizations, need not obey our laws, because of statutory immunity. *See* 22 U.S.C. § 288d. In short, nonimmigrant aliens do not bear the burdens assumed by citizens and permanent resident aliens and the State should not bear a heavy burden to justify classifications that disadvantage them.[9]

If strict scrutiny is not the applicable standard to measure classifications disadvantaging nonimmigrants, the University's policy need only be supported by some rational justification. *Califano v. Jobst*, 434 U.S. 47 (1977). And nothing advanced by the international bank students even remotely meets *their burden* of demonstrating that the University's policy is wholly without a rational basis.

Their assertion that the cost equalization rationale is suspect because some Maryland citizens are the beneficiaries of particular tax exemptions such as social security and retirement befefits and that some spouses of international bank employees pay some income tax is disingenuous. To collect more than two billion dollars in state income taxes, the great majority of state citizens and resident aliens must be contributing their share. In addition, it is difficult to analogize the situation of pensioners and other low income beneficiaries with that of international bank employees whose lucrative salaries and fringe benefits are exempt from federal and state income tax from the date they become employed in this country.[10]

[9] This Court has also repeatedly used the term "resident alien" to mean a lawfully admitted permanent resident alien and thus, to exclude nonimmigrants. *See* Cabell v. Chavez-Salido, 50 U.S.L.W. 4095 (U.S. Jan. 12, 1981) (both majority and dissenting opinions); Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977); Rosenberg v. Fleuti, 374 U.S. 449 (1963).

[10] The respondents observed below that an international bank employee may retire in this country and adjust his status at that time because his children may have become U.S. citizens and he

Moreover, for purposes of equal protection analysis, the classification is gauged by reference to broad general characteristics, "rather than by focusing on selected, atypical examples." *Califano v. Jobst*, 434 U.S. at 55.[11]

Finally, G-4 aliens' possible payment of property taxes, fuel taxes, and motor vehicle taxes does not help their position in the case. All of these taxes are for special enterprises, such as public elementary and secondary schools, bonds, and roads. These taxes do not support the University of Maryland.

For all of these reasons, the University contends that its policy need only meet a rational basis equal protection standard and that under this standard its treatment of nonimmigrants is constitutionally sound.

II.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT VIOLATE DUE PROCESS.

The international bank students now contend that the lower court found "as a fact" that the University's policy was primarily concerned with domicile prior to 1978 and

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may qualify for admission to the United States without regard to quotas. *See* Plaintiffs' Memorandum in Support of Summary Judgment at 27 (R. 191). Thus, such nonimmigrants may escape the payment of substantial amounts of tax for protracted periods.

[11] Likewise, the international bank students gain little by suggesting that permanent resident aliens holding a G-4 visa are also exempt from income tax on their salaries. First, as the respondents below argued, bank policies discourage such adjustments by their employees. Thus, few individuals (if any) fall into this category. As far as international bank students at the University of Maryland are concerned, the petitioners are not aware of any who are permanent resident aliens (and the record certainly does not establish that any such individuals exist). Second, it is important to note that citizens who work for the bank are not exempt from income tax on their compensation.

that this factual finding is subject to the "clearly erroneous" rule. Brief for Respondents at 39. However, the lower court, ruling on summary judgment, declined to base its legal conclusion on the record in the case. *Moreno v. Toll*, 480 F. Supp. 1116, 1123 (D. Md. 1979). Thus, it made no factual finding deserving of the clearly erroneous standard.[12]

The students also try to reshape and resurrect the irrebuttable presumption doctrine by contending that "flat objective requirements or exclusions" are permissible under due process but the classification at issue here is not. The petitioners submit that the University's denial of in-state benefits to nonimmigrants *is* a flat exclusion and that any attempt to salvage the irrebuttable presumption doctrine on such distinctions must founder in the wake of this Court's post-*Vlandis* cases.[13]

Finally, the University vigorously disputes the international bank students' contention that they have a "property right" or "liberty interest" in University benefits deserving of due process protection. The in-state policy confers no such right and affects no such interest and the respondents' position is without any support in the relevant case law.

For these reasons and those stated in the Brief of Petitioners, the University contends that its in-state policy did not offend due process.

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[12] The international bank students' contentions regarding the basis of the University's policy from 1976-78 are answered in the appendix to this brief.

[13] The respondents' new irrebuttable presumption doctrine is so artificial as to be impossible for any court to administer in a reasoned fashion.

III.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT VIOLATE THE SUPREMACY CLAUSE BY INTERFERING WITH INTERNATIONAL AGREEMENTS OF THE WORLD BANK AND INTER-AMERICAN DEVELOPMENT BANK.

The respondents and the amici international banks that have borne the cost of this litigation and stand to benefit from a result favorable to respondents (Brief of Banks at 13) argue as an alternate ground for sustaining the lower court decision that the University's in-state policy somehow interferes with the objectives of the agreements establishing the banks and conferring a tax exemption on bank compensation. However, this position was rejected by the lower court as "too attentuated" a conflict between state and bank policies. 489 F. Supp. at 667.[14] So too should it be rejected by this Court as factually unsupported and legally unsound.[15]

The international bank students and the international banks contend that the University is penalizing them because of the tax exemption World Bank and Inter-American Development Bank salaries receive pursuant to the respective agreements of these international organizations. In so arguing, they point to nothing in the agreements themselves that bars the University of Maryland or any other institution from charging G-4 students or any other nonimmigrant a higher tuition rate than that charged to citizens and permanent resident aliens. Moreover, they can point to nothing in the language of the University's in-state policy that denies a G-4 student in-state status solely on the basis of a treaty-based tax exemption. The policy simply excludes nonimmigrants and G-4's happen to fall into that category. Rather, they attack

[14] This issue was not decided by the court of appeals.

[15] The banks belatedly attempt to supplement the record with self-serving declarations filed in a never-tried circuit court case in Montgomery County. *See* Brief for Banks at 12-13.

one of the University's *rationales* for excluding nonimmigrant aliens (including G-4's) from qualifying for in-state status, *viz.*, that nonimmigrants as a class either because of the short period they stay in this country or because of privileged tax status do not fully or effectively contribute to the cost of education at the University. And they contend that this rationale conflicts with a purported *rationale* of the international agreements. Never before has a supremacy clause argument been premised on such a concocted clash of policies.

It was incombent upon the respondents to show below that a "conflict" exists between the international agreements and the University's in-state policy. *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923). As noted eariler, there is no conflict between the language of the international agreements and the University's policy. If the State tried to tax the salaries of bank employees when such taxation was barred by the agreements, or denied them an educational benefit that was conferred by the agreements, then a conflict might arise. But that is not the case here. Among all the privileges conferred upon employees by the bank agreements and the International Organizations Immunities Act, the right to preferential public tuition is neither expressly mentioned nor necessarily implied.

International bank employees already receive generous dependency allowances to support their children's needs, Senate Report No. 94-1009, *Foreign Assistance and Related Programs Appropriation Bill*, 1977 (94th Cong., 2d Sess.) at 104-05. And these employees also receive a tuition equalization subsidy that pays the difference between in-state and out-of-state tuition. Brief of Banks at 13. Thus, existing personnel policies of the international banks ensure that the residency rules of the University of Maryland and most other public colleges and universities

pose no financial burden to employees. More importantly, however, the federal government, which is a party to the agreements in question that bar federal income taxation, presently denies various education benefits to G-4's and other nonimmigrants who do not attempt to adjust their immigration status. *See, e.g.*, 34 C.F.R. § 201(a). And both the President and Congress have been vocal critics of the banks' lucrative fringe benefits. *See* Foreign Assistance and Related Programs Bill, 1978, Sen. Rept. No. 95-352, 95th Cong., 1st Sess., at 121 (May 18, 1977). Thus, it is difficult to impute a federal policy of shifting the cost of such unnecessary benefits to state taxpayers.

Finally, it should be noted that the University's policy denies in-state status to nonimmigrants, regardless of their actual income tax contributions (just as it automatically denies in-state status to citizens in the Armed Forces who are assigned for educational purposes to the University without looking into actual tax contributions). This results in a denial of benefits to G-4's whose tax exemption is dependent upon federal law as well as to those whose exemption is dependent upon treaty.[16] In short, the in-state policy does not look to an international agreement or interfere with it in any conceivable way.

[16] And only a small number of international organization employees fall into the latter category.

CONCLUSION

In summary, the petitioners contend that the due process, equal protection, and supremacy clauses do not mandate invalidation of the University's in-state policy. For these reasons, and for those appearing in the Brief of Petitioners and the Brief of Alabama, et al., as amici curiae, the judgment of the Court of Appeals should be reversed and *Vlandis v. Kline*, 412 U.S. 441 (1973), should be overruled.

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APPENDIX

Summary Responses to Respondents' Contentions

Many of the contentions made by the international bank students can be answered in abbreviated fashion or by citation to existing authority or references to material contained in the earlier briefs of petitioners. For the convenience of the Court, petitioners provide these summary responses to these arguments.

Contention of Respondents:	*The University's Response:*
1. The U.S. Attorney General has concluded that international bank employees cannot waive their tax exemption. Brief at 2, N. 2.	1. The Attorney General has said only that Congress cannot waive these exemptions by statute. 41 Op. Atty. Gen. 170 (1954).
2. It is difficult for bank employees to adjust their status to permanent resident alien. Brief at 17, N. 11.	2. The banks' own loosely-worded agreements leave plenty of room for individual adjustments.
3. G-4 visa holders include clerical personnel for whom the tuition differential could make a significant difference. Brief at 20, N. 15.	3. Nonimmigrant aliens as a class and G-4 aliens are not precluded from qualifying for state scholarships which are awarded if an applicant can demonstrate, *inter alia*, financial need. 50 Op. Md. Atty. Gen. 155 (1965).
4. The denial of a higher education is at issue here because in-state status also includes preference for admission. Brief at 20, N. 15.	4. None of the respondents were denied admission, nor is such a likelihood in light of declining enrollments. In any event, the lower court issued no relief regarding admission. (P.A. 48a & 99a).
5. The Federal Government does not exclude all nonimmigrants from eligibility for low interest student loans. Brief at 21, N. 17.	5. To meet the requirements of 34 C.F.R. § 201(a), a nonimmigrant alien at the very least must have applied for a change in visa status to that of a permanent resident alien.

Contention of Respondents:	*The University's Response:*
6. Most nonimmigrants are incapable as a matter of federal law of acquiring domicile. Brief at 26.	6. Of the 12 general categories of nonimmigrants, only 4 are required to "have a residence in a foreign country which [they] have no intention of abandoning." 8 U.S.C. § 1101(a)(15)(B), (F), (H) and (J).
7. State laws which impose discriminatory burdens on the residence of aliens conflict with the Supremacy Clause. Brief at 28.	7. Only State classifications which strike at the noncitizen's ability to exist in the community are at odds with the congressional determination to admit the alien to permanent residence. *Foley v. Connelie*, 435 U.S. 291, 295 (1978).
8. The amicus brief of the United States in *Plyler v. Doe* and *In Re Alien Children Education Litigation* (No. 80-1538 & 80-1934) agrees with respondents' view that the University's policy is a prohibited attempt to regulate immigration. Brief at 32.	8. The brief of the United States notes at 16, N. 11, that the "education of aliens is not a . . . central concern of the immigration laws."
9. If the July 13, 1976 district court order had been stayed without conditions, the University would have a valid argument under the 11th Amendment. Brief at 43.	9. The only relevant condition contained in the 1976 order, viz., that it be "finally affirmed" on appealed, never occurred.
10. The 1976 district court order was not vacated. Brief at 45.	10. Because of the remand from this Court, the district court could not have kept the 1976 order requiring due process in tact and at the same time consider anew the due process issue.

Contention of Respondents:	*The University's Response:*
11. Rule 60 of the Federal Rules of Civil Procedure permit the trial court to consider the due process issue without vacating its 1976 order. Brief. at 45, N. 37.	11. That rule applies only in cases of mistake, newly discovered evidence, fraud, etc., not here.
12. The June 1978 resolution of the Board of Regents showed a different basis for its in-state policy. Brief at 38, N. 28.	12. The resolution did not adopt a new in-state policy. Brief for Respondents at 47.
13. Prior to June 23, 1978, the University represented that its in-state policy was concerned with Maryland domicile. Addendum B to Brief for Respondents.	13. All the documentary evidence below showed that the denial of in-state status to the respondents was premised on two grounds: the University's interpretation of the law of domicile *and* the Policy's rationale of cost equalization. Brief of Petitioners at 6-7.*

* Nothing in the petitioners' answers to interrogatories or requests for admission undercuts the existence of the cost equalization purpose for the Policy. For example, in response to the request for admissions, the University denied:

> The fact that the "G-4 alien" parent, upon whom a "G-4 alien" student is financially dependent, pays Maryland income tax on some unearned income but on no earned income, is relevant to the *determination* made pursuant to the above-mentioned University of Maryland policy, "Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes" that such "G-4 alien" student will not be granted in-state status. (Emphasis added).

This denial is as true today as it was when made. The policy by its own terms denies benefits to nonimmigrant aliens. It does not permit a "determination" to be made with respect to the *actual* tax contributions of this class. It rationally excludes such persons from benefits, *inter alia*, because the class is generally composed of those who are here for temporary periods and thus have not contributed to the State's economy or those who, like the students' fathers, are not subject to the full range of state taxation. On the other hand, permanent resident aliens as a class are on a citizenship track, pay taxes precisely like U. S. citizens, and the great majority of them remain here indefinitely. *See* G. Rosburg, *Aliens and Equal Protection: Why Not the*

Right to Vote?, 75 Mich. L. Rev. 1092, 1110-11 (1977); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977). Thus, for such a class, the policy does not focus *solely* on actual state income tax contributions. *See* Defendants' Answers to Plaintiffs' Requests for Admission (R. 142). Indeed, the *students'* memoranda of law, such as that filed in support of their motion for summary judgment, characterized cost equalization as an "objective" of the policy (R. 183), noted that the University had emphasized the importance of the policy of cost equalization as the basis for denying their appeals (R. 163), and argued against the rationality of this objective (R. 193).

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No. 80-2178

In The Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, AND UNIVERSITY OF MARYLAND, PETITIONERS,

v.

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ON WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

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INTERESTS OF AMICI

The interests of the amici curiae and our reasons for urging this Court to reverse the decision of the circuit court in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), are as follows:

The amici curiae are the other forty-nine (49) sovereign States that have joined Maryland to show their deep concern about the issues raised in this case and the impact their resolution will have on the constitutionality of the tuition policies of numerous public colleges and universities and on the constitutionality of many other State classifications. The unprecedented involvement here of every State in the Union is motivated by reasons transcending the financial cost to States of an adverse decision, although that would be enormous, and the importance of the case to public institutions of higher education, which cannot be minimized. Foremost is our interest in reasoned constitutional adjudication and the principles that should govern lower courts in their approach to resolving constitutional challenges to State statutes and policies. Thus, we stand with Maryland in this case.

As amici curiae, we steadfastly maintain that the irrebuttable presumption doctrine relied upon by the lower courts has outlived whatever utility it may have had and that this case is the appropriate vehicle to overrule *Vlandis v. Kline*, 412 U.S. 441 (1973). Since 1975, this Court has repeatedly rejected the invocation of the irrebuttable presumption doctrine. Most of the federal circuits have effectively declared the doctrine moribund or its remnants constitutionally unsound or redundant. Yet as long as *Vlandis* survives, there will be decisions like that of the Fourth Circuit which threaten to breathe new life into this disfavored analysis. In the area of equal protection, this Court has generally refused to impose a requirement that State classifications be perfect. *Vance v. Bradley*, 440 U.S. 93 (1979); *Dandridge v. Williams*, 397 U.S. 471 (1970). The time has come to lay to rest the due process equivalent of this discarded perfection standard — the "universally true" requirement of the irrebuttable presumption doctrine.

If the decision of the Fourth Circuit should stand, it will also have a deleterious effect on the rationally-based tuition policies of many public colleges and universities. In striking down the University of Maryland's policy of excluding nonimmigrant

aliens from in-state benefits, the court of appeals has not only invalidated a line drawn by most public colleges and universities in the United States, but it has also called into question the very rationale for the in-state/out-of-state distinction, *viz.*, that those classes which contribute the least to the cost of a public higher education should not be subsidized in the same fashion as those classes which make full contributions.

Finally, we contend that the lower court grievously mishandled the equal protection and supremacy clause issues. In holding unconstitutional the exclusion of nonimmigrant aliens from in-state benefits, the decision below improperly overextended the reach of suspect class equal protection analysis to a subclass of aliens bearing few of the burdens shared by citizens and permanent resident aliens and of the state "regulation of immigration" supremacy clause doctrine beyond any rationale articulated by this Court. If the decision below is allowed to stand, large numbers of nonimmigrant alien students who contribute little to the cost of a public education will be permitted to qualify for in-state benefits, with a resulting impact on the budgets of publicly-supported schools.[1]

SUMMARY OF ARGUMENT

VLANDIS v. KLINE SHOULD BE OVERRULED

Since 1975, this Court has rejected every invocation of the irrebuttable presumption doctrine and this due process analysis has been criticized by many of the federal circuits. In fact, the precise holding of *Vlandis v. Kline*, 412 U.S. 441 (1973), has not survived *Weinberger v. Salfi*, 442 U.S. 749 (1975), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Attempts to modify *Vlandis* to invalidate a conclusive presumption of a factor designated a "paramount" policy consideration conflict with *McGowan v. Maryland*, 366 U.S. 420 (1961), and *McGinnis v. Royster*, 410 U.S. 263 (1973).

[1] While we do not write separately on the point, we also align ourselves with the petitioners in urging that, in any event, the ordering of retroactive refunds in this case contravened the eleventh amendment.

Vlandis is inconsistent with any theory of procedural or substantive due process and the doctrine of irrebuttable presumptions as presently formulated does not insure the rationality of classifications — the only legitimate judicial inquiry. Finally, the applications of the irrebuttable presumption doctrine is particularly irrational in the present case where a finding of constitutionality turned on the issuance of a University resolution which changed neither the language nor the operation of its policy of denying in-state benefits to nonimmigrants.

THE UNIVERSITY OF MARYLAND'S IN-STATE POLICY DOES NOT VIOLATE THE EQUAL PROTECTION OR SUPREMACY CLAUSES.

It is perfectly rational to accord in-state benefits to citizens and permanent resident aliens but not nonimmigrants because the latter class is accorded an income tax advantage and thus contributes less to the economy of the State and the operation of the University of Maryland (which is supported primarily by income tax revenues). Supreme Court cases applying strict scrutiny to alien classifications have all involved "resident aliens," not nonimmigrants. Finally, because it does not deny a necessity of life to resident aliens, the University of Maryland's in-state policy does not constitute a regulation of immigration.

ARGUMENT

I.

THE LOWER COURTS' ERRONEOUS CONCLUSION THAT THE UNIVERSITY'S IN-STATE POLICY VIOLATES DUE PROCESS DEMONSTRATES WHY THE IRREBUTTABLE PRESUMPTION DOCTRINE OF *VLANDIS v. KLINE* SHOULD BE REJECTED AS A MEASURE OF GOVERNMENT CLASSIFICATIONS.

Ever since *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), proclaimed the irrebuttable presumption analysis of *Vlandis v. Kline*, 412 U.S. 441 (1973), "a virtual engine of destruction for countless legislative judgments," this Court has declined every

invitation to apply the doctrine to invalidate rationally-based classifications not affecting fundamental liberties or even to suggest its possible relevance to what might have formerly been considered applicable situations. *See New York City Transit Authority v. Beazer,* 440 U.S. 568, 592 n.38 (1979); *Friedman v. Rogers,* 440 U.S. 1, 7 n.8 (1979); *Vance v. Bradley,* 440 U.S. 93 (1979); *First National Bank v. Bellotti,* 435 U.S. 765, 772-74 1978); *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex,* 430 U.S. 961 (1977) (*mem.); Fiallo v. Bell,* 430 U.S. 787, 791 (1977); *Knebel v. Hein,* 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).

With the notable exception of the Fourth Circuit, the United States Courts of Appeals have declined to employ the doctrine as a separate analysis, and a number of courts have gone out of their way to criticize irrebuttable presumptions and to declare the doctrine moribund. *See, e.g., Sakol v. Commissioner,* 574 F.2d 694, 698 n.10 (2d Cir.), *cert. denied,* 439 U.S. 859 (1978) (cases cited with approval in *Vlandis* are " 'plainly not good law today' "); *Malmed v. Thornburgh,* 621 F.2d 565, 575-76 (3d Cir. 1980) ("As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant 'Lochner-ism,' *see Lochner v. New York,* 198 U.S. 45 . . . (1905), a concept that has been administered suitable last rites and mercifully interred."); *Trafelet v. Thompson,* 594 F.2d 623, 630 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (if classification is rationally related to legitimate state purpose and thus not violative of equal protection, it does not create an irrebuttable presumption); *deLaurier v. San Diego Unified School District,* 588 F.2d 674, 683 n.16 (9th Cir. 1978); *Martin v. Bergland,* 639 F.2d 647, 659 n.12 (10th Cir. 1981) ("For purposes of this

case, we read *Usery and Salfi* as an indication that the [irrebuttable presumption] doctrine is moribund.")[2]

Although this impressive authority should have signaled the end for irrebuttable presumptions, there are courts like the Fourth Circuit that will continue to rely upon *Vlandis v. Kline* until it is overruled. In fact, among some courts, *Vlandis* has been reincarnated to justify a middle tier equal protection scrutiny of economic and social welfare classifications. *See Attorney General v. Waldron*, 289 Md. 685, 426 A.2d 929 945 (1981) (invalidating state statute preventing retired judge who receives pension from practicing law); *Board of Education, Levittown Union Free School District v. Nyquist*, No. 2966E-80, slip opinion at 22 (N.Y. Sup. Ct. Oct. 26, 1981) (striking down New York's system of public school finance); Tribe, *American Constitutional Law* § 16-31, at 1090 (1978).[3]

There are a host of reasons why lower courts should no longer be permitted to invoke *Vlandis* to justify attacks on rational state classifications.

First, *Vlandis* is utterly inconsistent with subsequent decisions of this Court. The 1973 case involved a challenge to a State residency classification that would have been sustained under traditional equal protection principles. The statute did not disadvantage a suspect class or impact on a fundamental right,

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[2] Even the Fourth Circuit, between its two summary affirmatives in the present case, said:

> The doctrine of impermissible irrebuttable or conclusive presumption has been justly criticized as of doubtful constitutional antecedents and of limited application.

Fairfax Hospital Association, Inc. v. Califano, 585 F.2d 602, 608 (4th Cir. 1978).

[3] It is also noteworthy that courts that continue to rely on *Vlandis* do so without in any way suggesting that it has been, at the very least, modified by Weinberger v. Salfi, 422 U.S. 749 (1975). *Compare* Pentco, Inc. v. Moody, 474 F. Supp. 1001, 1005-06 (S.D. Ohio 1978) *and* Molyneaux v. Pennsylvania Department of Public Welfare, 403 A.2d 634 (Pa. Commonw. Ct. 1979) *with* Elkins v. Moreno, 435 U.S. 647, 660 (1978).

and the majority conceded at least one rational basis for the classification. 412 U.S. at 451. Thus, although found to violate due process as an irrebuttable presumption, it did not violate equal protection. *See Dandridge v. Williams*, 397 U.S. 471 (1970). More recent cases of this Court, however, indicate that once the constitutionality of a classification is sustained against an equal protection attack, it will also survive an irrebuttable presumption due process challenge. *See Weinberger v. Salfi*, 422 U.S. at 769-70; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (irrebuttable presumption not violative of due process "when its operation and effect are clearly permissible"). *See* also cases cited *supra* at 5.[4] Thus, under presently applicable principles, the statute in *Vlandis* would be upheld and the holding of that case is no longer good law.[5]

Second, any attempt to salvage a portion of *Vlandis* or a *modified* irrebuttable presumption doctrine would similarly break apart on the strength of more persuasive cases. *Salfi* describes *Vlandis* as a situation where the State statute "purported" to speak in terms of one factor but then made evidence relating to that factor inadmissible. *Weinberger v. Salfi*, 422 U.S. at 772. And *Elkins v. Moreno*, 435 U.S. 647, 660 (1978), said that *Vlandis* as limited by *Salfi* applied when the State makes a factor, such as domicile, its "paramount policy

[4] In the past, the line between denial of equal protection and an impermissible irrebuttable presumption has sometimes been hard to decipher and this Court has cited equal protection cases in finding an irrebuttable presumption and vice versa. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965), cited in Vlandis v. Kline, 412 U.S. at 447 n.4. *See also* United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973), an irrebuttable presumption case cited as an equal protection one in U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 n.10 (1980); and Jiminez v. Weinberger, 417 U.S. 628 (1974), an equal protection case cited as an irrebuttable presumption case in Justice Brennan's dissent in Weinberger v. Salfi, 422 U.S. at 802-04.

[5] As noted in Tribe, *American Constitutional Law* § 16-32 at 1095 n.25, the difficulty of reconciling *Vlandis*, *Usery*, and *Salfi* "should not be underestimated." See also the dissenting opinion of Justice Brennan in *Salfi*, which argued that the majority opinion and *Vlandis* could not co-exist. Weinberger v. Salfi, 422 U.S. at 802-03.

consideration," yet conclusively presumes that a person is unable to meet that test. However, social welfare classifications such as those at issue in *Vlandis* and *Moreno* will pass muster under equal protection if any state of facts *reasonably may be conceived* to justify them, regardless of what they purport to do. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). And in *McGinnis v. Royster*, 410 U.S. 263, 276 (1973), an equal protection case, this Court said that "our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which is subordinate." Clearly, if by surviving an equal protection challenge a classification satisfies the requirements of the due process clause (as this Court's cases indicate), it is hard to fathom what purpose is still served by the irrebuttable presumption doctrine, no matter how it is modified.

Third, *Vlandis* with its language of strict scrutiny, 412 U.S. at 451, and even as modified, still cannot be squared with any prevailing theory of equal protection or due process. As noted above, application of traditional equal protection analysis to a *Vlandis*-type classification would result in a finding of constitutionality. Moreover, *Vlandis* was clearly not a procedural due process case and could not be justified on such a basis. The Connecticut in-state tuition scheme challenged created no "property" interest for out-of-state students. *Bishop v. Wood*, 426 U.S. 341 (1976).[6] And certainly the statute could not be said to create a "liberty" interest deserving of due process protection. *Cf. Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974) (in-state tuition does not constitute one of the "necessities of life"). Nor can the decision in *Vlandis* be justified on any substantive due process theory which, in the absence of an impact on fundamental rights, requires only a rational basis. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978). *See also Malmed v. Thornburgh*, 621 F.2d 565, 575-76 (3d Cir. 1980).

[6] Indeed, the only possible *source* of a property right — the statute — denied its benefits to students it defined as out-of-staters.

Fourth, the irrebuttable presumption doctrine, as presently formulated, makes little sense and serves only as a trap for the incautious pleader. In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977), this Court held that if a State policy serves any purpose other than the measure of an irrebuttable fact, implication of an irrebuttable presumption fails. In *Elkins*, this doctrine was apparently restated to suggest that the "other purpose" must be argued as the paramount State interest rather than as a subsidiary one. 435 U.S. at 660. Nevertheless, neither formulation would appear to require the rationality of any purpose proffered. If the irrebuttable presumption doctrine means what these cases suggest, it would merely encourage legislators and policy makers to pay lip service to alternative rationales or their counsel to plead as many statutory or regulatory purposes as conceivable. It would not foster or enhance the rationality of any measure, which should be the only focus of the courts in any event.

Moreover, the decision below, by finding an irrebuttable presumption in the University's in-state policy prior to 1978 but not after, simply on the basis of a University resolution reaffirming interests asserted throughout the litigation, defies reason. The resolution neither altered the terms of the in-state policy nor removed its exclusion of nonimmigrants from benefits. To draw a constitutional difference on the basis of such an assertion of interests reduces the irrebuttable presumption doctrine to one not worth saving.[7]

[7] It is noteworthy that the cost equalization rationale allegedly made "paramount" in the 1978 resolution was present in the case from its inception. Moreno v. Toll, 480 F. Supp. 1116, 1123-24 (D. Md. 1979); Moreno v. University of Maryland, 420 F. Supp. 541, 560 (D. Md. 1976). Indeed, reasonable minds would think that cost-equalization is the *raison d'etre* of any in-state policy.

The district court erroneously and expressly rejected cost-equalization as an alternative rationale for the University's policy in 1976 on the obvious ground that *Vlandis* in its unvarnished state — without modification by *Salfi* — controlled the outcome. 420 F. Supp. at 560. It is hard to believe that the Constitution should punish the University of Maryland simply because the trial judge was unaware of

In this case, the Court of Appeals for the Fourth Circuit invalidated a rationally-based State policy by impermissibly picking and choosing between primary and secondary rationales for a governmental classification. *See McGinnis v. Royster,* 410 U.S. 263, 276 (1973) ("So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying."). Although there may indeed be ways for this Court to reverse that decision without overruling *Vlandis,*[8] it is hard to imagine a case better than the present one to demonstrate the intellectual failings of the irrebuttable presumption doctrine. For this reason, we urge the Court to set aside the decision of the Fourth Circuit and, in so doing, to overrule *Vlandis v. Kline.*

II.

THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT GRANTING A LOWER EDUCATIONAL SUBSIDY TO NONIMMIGRANT ALIENS TRIGGERS STRICT EQUAL PROTECTION SCRUTINY AND CONSTITUTES IMPERMISSIBLE STATE REGULATION OF IMMIGRATION.

Most public colleges and universities in the United States confer eligibility for in-state benefits on citizens and permanent resident aliens but deny such preferential treatment to nonimmigrant aliens. Because of the large numbers of resident aliens who qualify, such a policy cannot be laid to an anti-alien

Salfi — anymore than it makes constitutional sense to punish the University because it may have erroneously construed the Maryland law of domicile, particularly when its in-state policy is otherwise rationally based.

[8] The petitioners contend that this Court's decision in Toll v. Moreno, 441 U.S. 458 (1979), should have removed the irrebuttable presumption issue from the case. In addition, if the University is successful in winning reversal on equal protection grounds, this Court could reject any implication of an irrebuttable presumption on the basis of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 24 (1976) (regulation in terms of an irrebuttable presumption not invalidated "when its operation and effect are clearly permissible"). Finally, they urge that *Vlandis* might be reinterpreted and distinguished as a case involving an irrational residency requirement. *See* Sosna v. Iowa, 419 U.S. 393, 409 (1975); Vlandis v. Kline, 412 U.S. at 456-59.

animus. *See New York City Transit Authority v. Beazer*, 440 U.S. at 592-93. Rather, it has its basis in the recognition of the very real differences that exist between nonimmigrants and citizens and permanent resident aliens (immigrants), most importantly, with respect to the burdens shared and the contributions made by each class.

As one scholar has noted:

> Immigrant aliens are admitted to the United States with the expectation that they will remain here indefinitely and will eventually become citizens. Nonimmigrants, by contrast, cannot have an intention of remaining here indefinitely, since they are admitted for a limited purpose and for a limited period of time. They do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the State. It may be perfectly rational to deny them benefits that are made available to the State's permanent residents.

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. One of the burdens shared by citizens and permanent resident aliens and avoided by nonimmigrants generally is full contribution by way of tax dollars to State programs and services such as the cost of a public higher education.

It is the State's income tax that is the primary source of revenue for the operation of the University of Maryland. Yet it is clear that *all* nonimmigrants are treated more advantageously than citizens and resident aliens with respect to the payment of State income taxes. Many are spared the tax placed on the worldwide income of citizens and resident aliens. *See* I.R.C. § 872 and Md. Ann. Code art. 81, § 280(a) (1980). Numerous other nonimmigrants, particularly those unable to work, are not within the State long enough to lend tax support to the cost of a public higher education. Some nonimmigrants, like the parents of the respondents, are exempt from State income tax on their

international bank salaries. Although the basis for their individual income tax advantage may vary, it is nevertheless clear that all nonimmigrants, including the subclass represented by the international bank students, are accorded an income tax advantage over citizen and permanent resident aliens and thus contribute less to the costs of operating the University of Maryland.

In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), the Court said that a State could not rely upon a justification of limiting expenditures with respect to "tax revenues to which aliens have contributed on an equal basis with the residents of the State." Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not discriminate against resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." The converse of these propositions is true — where an alien subclass (not including permanent resident aliens) has not contributed on an equal basis to tax revenues and does not pay its full share of taxes that support educational programs, justifications of limiting expenditures and equalizing the costs of education with respect to tax contributions are constitutionally permissible interests.

The international bank students contend that they are in fact "resident aliens" within the meaning of this Court's cases requiring strict scrutiny of certain classifications disadvantaging resident aliens; that the class disadvantaged by the University's policy consists only of nonimmigrants capable of acquiring domicile, not all nonimmigrants; and that they do pay certain State taxes. All of these arguments miss the mark.

The term "resident alien" as used in *Graham* and *Mauclet* means permanent resident aliens not nonimmigrants, many of whom do not remain long in this country and all of whom do not serve in the armed forces and pay their full share of taxes. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977). Moreover, it is clear that the

lower court struck down the University's policy as applied to all nonimmigrants — because that is precisely what it said it did. *See Moreno v. University of Maryland,* 645 F.2d 217, 220 (4th Cir. 1981) (concluding that the district court applied "strict scrutiny to the suspect classification of nonimmigrant aliens").

In any event, the respondents benefit little by attempting to redefine and narrow the class because the University's tax contribution/cost equalization rationale is even more compelling as applied to a tax privileged group seeking "more precise special rules for that special class." *New York City Transit Authority v. Beazer,* 440 U.S. at 589.[9] Finally, by suggesting that they may pay some sales and property taxes to the State, the students do little to advance their position because, in the main, it is the income tax that supports the University of Maryland.

In summary, the exclusion of nonimmigrant aliens from in-state benefits does not affect a suspect class and is rationally justified by the principle of cost equalization. Thus, the University's policy is not violative of equal protection.

As handled by the lower courts, the supremacy clause issue rises or falls with the outcome of the equal protection question. *See Moreno v. University of Maryland,* 645 F.2d at 220. Thus, if this Court sustains the University's policy under the fourteenth amendment, it should automatically reject the lower courts' decisions on the supremacy clause issue. In any event, there is simply no basis for finding here an impermissible State attempt to regulate immigration, because that preemption

[9] Moreover, it is no answer to say that the elusive concept of domicile will limit the number of nonimmigrants who can qualify for in-state tuition. In Elkins v. Moreno, 435 U.S. 647 (1978), this Court ultimately left it to State courts to determine whether State law precluded the establishment of domicile for the category of nonimmigrants in question. And, it would appear that most State courts do not consider nonimmigrants' visa restrictions as barring the establishment of domicile. *See* Annot., *What Constitutes Residence or Domicile Within State by Citizens of Another Country for Purpose of Jurisdiction in Divorce,* 51 A.L.R. 3d 223, 233-35 (1973).

doctrine has no application to the denial of a State benefit that is not a necessity of life. *Foley v. Connelie*, 435 U.S. 291, 295 (1978). Clearly, in-state tuition does not fall into that category. *Memorial Hospital v. Maricopa County*, *415 U.S.* at 260 n.15.

CONCLUSION

The decisions of the lower courts represent a fundamental misreading of constitutional law. They dangerously overextend the suspect class and supremacy clause doctrines and attempt to resurrect the discarded irrebuttable presumption analysis. For all of these reasons, we urge as amici curiae that the Court reverse the judgments below and overrule *Vlandis v. Kline*.

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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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November, 1981

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Pentco, Inc. v. Moody, 474 F. Supp. 1001 (S.D. Ohio 1978) 7

Schlesinger v. Wisconsin, 270 U.S. 230 (1926) 6

Stanley v. Illinois, 405 U.S. 645 (1972) 6

Starns v. Malkerson, 326 F. Supp. 234 (Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (*mem.*) ... 11

Turner v. Department of Employment Security, 423 U.S. 44 (1975) 8

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Miscellaneous

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Comment, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L. Rev. 644 (1975) 8

Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975) 8

Note, The Conclusive Presumption Doctrine: Equal Process or Due Protection?, 72 Mich. L. Rev. 800 (1974) 8

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Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275 ..... 10, 11

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AND
THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES
AS AMICI CURIAE
IN SUPPORT OF THE PETITIONERS

This is a brief of *amici curiae* permitted by Rule 36.2. The written consent of all parties to the case has been lodged with the Clerk, and this brief is being filed within the time allowed for filing the petitioners' brief.

INTERESTS OF THE *AMICI CURIAE*

This case raises issues of great importance to public colleges and universities across the nation. The difference between in-state and out-of-state tuition and fees represents a vital source of income to these institutions, especially in this time of decreasing governmental resources to fund public higher education. Almost ten years ago, the additional income derived from out-of-state tuition and fees was estimated at $250 to $300 million annually for the 400 public colleges and universities belonging to the National Association of State Universities and Land-Grant Colleges and the American Association of State Colleges and Universities. Waugh, *Is Out-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time, inflation, and an ailing economy have obviously heightened dependence on this important source of revenue.

The *amici curiae* are the principal associations of colleges and universities in the United States. Our member institutions comprise the overwhelming majority of publicly-supported colleges and universities in the nation.

The American Council on Education, founded in 1918, is the nation's largest association of colleges and universities. Its membership includes 1,380 institutions of higher education, 177 national and regional associations, and 61 affiliated institutions and organizations concerned with higher education in the United States. The Council, through voluntary and cooperative action, seeks to provide comprehensive leadership for improving educational standards, policies, and procedures.

The National Association of State Universities and Land-Grant Colleges is an organization representing public institutions that are among the largest colleges, universities, and complex multi-campus systems of higher education in the United States. Its 140 member institutions include land-grant colleges and universities, state universities, urban universities, and major campuses of multi-campus universities. The sector of higher education represented by the Association grants 38%

of all degrees awarded in the United States, including 36% of all bachelors, 39% of all first professional, 42% of all masters, and 64% of all doctorate degrees.

The American Association of State Colleges and Universities is an organization consisting of 345 member colleges and universities and their presidents or chancellors together with 34 associate members who are chancellors, executive directors, or heads of boards of trustees of state college systems. It was organized in 1961, and its member institutions have a total enrollment in excess of 2,500,000.

The American Association of Community and Junior Colleges was organized in 1920. Its membership of more than 900 institutions comprises a majority of the country's community and junior colleges, including both publicly and independently supported institutions, which enroll almost 5,000,000 students.

As *amici curiae,* we write to demonstrate our vital concern for the fiscal integrity of public colleges and universities. At this time of drastic budget cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective post-secondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public post-secondary institutions in the United States.

SUMMARY OF ARGUMENT

As *amici curiae,* we urge that the Court reverse the judgments of the district court and court of appeals, uphold the University of Maryland's in-state policy, and overrule *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

Irrebuttable Presumption Analysis Should Be Ended

The application of irrebuttable presumption due process analysis, as sanctioned by *Vlandis* v. *Kline,* 412 U.S. 441 (1973), provides an opportunity for courts to second guess the wisdom of rational governmental policies that would be unassailable when measured against traditional equal protection concepts. Although this Court has all but repudiated the irrebuttable presumption doctrine and declined to employ it since 1975, there are lower courts, including those in this case, that improperly continue its use. A return to reasoned constitutional adjudication requires that the irrebuttable presumption doctrine of *Vlandis v. Kline* be overruled.

Rational Basis Analysis Should Govern The Denial Of In-State Benefits To Nonimmigrant Aliens

Those groups that share in the benefits of public higher education should bear its costs proportionately. This truism is the basis for in-state/out-of-state tuition and fee differentials. Citizens and permanent resident aliens who are domiciled in the State are subject to the full range of State taxation, including the State income tax that supports public colleges and universities. As a group, they are more deserving of in-state fees than nonimmigrants (who tend to spend brief periods of time within the State or not to be subject to its income taxation), financially dependent students, and members of the Armed Forces whose fees are paid by the military, all of whom are required to pay out-of-state fees. Where some citizens and aliens can qualify for in-state tuition and fees and

others are disqualified, it is reasonable to conclude that the in-state policy does not discriminate against aliens as a class. Under these circumstances, the rational bases for the lines drawn by the in-state policy should be more than ample to sustain the policy against equal protection challenge.

ARGUMENT

I.

THE IRREBUTTABLE PRESUMPTION DOCTRINE SHOULD BE REJECTED AS A TOOL TO GAUGE GOVERNMENT CLASSIFICATIONS.

After this Court's decision in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), public colleges and universities across the United States, including the University of Maryland, changed their in-state policies to assure flexible, individualized consideration of student residency determinations in all cases where student domicile was important. Thus, elaborate and expensive procedures, with appeals mechanisms, were universally established.

These institutions continued, however, to give effect to the overriding cost-equalization basis for the in-state/out-of-state tuition and fee differential. For this reason, most public colleges and universities still deny in-state benefits, without regard to domicile, to several classes of students, including nonimmigrant aliens.

Now *Vlandis* v. *Kline* and its long-disfavored irrebuttable presumption analysis are being used to invalidate these rational in-state policies. This situation demonstrates why *Vlandis* and its irrebuttable presumption doctrine should be overruled.

As one commentator has noted, "it is difficult to recall any doctrine utilized by the Court in recent years which has met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis." Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. Colo. L.

Rev. 653 (1976). With its roots in cases decided in the heyday of substantive due process analysis,[1] the doctrine lay dormant for nearly 40 years, as this Court reestablished the line between legislation and adjudication and removed from judicial inquiry the subject of the wisdom of legislation.

When the doctrine reappeared in the early seventies, the first results of its application were neither startling nor inconsistent with those reached through more traditional methodologies. In *Bell* v. *Burson,* 402 U.S. 535 (1971), for example, the Court held that Georgia must afford a driver a hearing on fault or liability before suspending his license, a result consistent with procedural due process requirements when a "liberty" interest such as the right to pursue a livelihood is impaired; and in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), a presumption that an unwed father was unfit to have custody of his children was struck down primarily because the challenged legislative scheme affected basic civil rights such as fatherhood.[2]

In *Vlandis,* however, constitutional adjudication went awry as "strict judicial scrutiny" in the guise of the irrebuttable presumption due process doctrine was used to invalidate a concedly rationally based state classification. Despite the fact that the Connecticut in-state tuition scheme challenged in *Vlandis* created no "property" interest for out-of-state students, *Bishop* v. *Wood,* 426 U.S. 341 (1976), and implicated no "liberty" interest, *see Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 260 n.15 (1974), due process was said to require individual determination of in-state status for students. Even though no constitutionally protected interest was at stake in *Vlandis,* the majority rejected all rational interests proffered in support of the challenged classification, requiring the State,

[1] *Heiner* v. *Donnan,* 285 U.S. 312 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230 (1926). In *Schlesinger,* Justice Holmes, joined by Justices Brandeis and Stone in dissent, leveled the first blast of criticism at the doctrine. 270 U.S. at 241-42.

[2] *Stanley* was decided below and argued in this Court on equal protection grounds.

in the language of struct scrutiny, to employ the least restrictive alternative to further its ends. 412 U.S. at 451-52.

In a prophetic dissenting opinion, the Chief Justice expressed his concern over application of the irrebuttable presumption doctrine:

> There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

412 U.S. at 462.

These fears proved well grounded. *Vlandis* was followed by numerous lower court decisions featuring its unprincipled constitutional analysis. *See, e.g., Molyneaux* v. *Pennsylvania Department of Public Welfare,* 403 A.2d 634 (Pa. Commonw. Ct. 1979) (striking down welfare rule on the allocation of parental income to children); *Pentco, Inc.* v. *Moody,* 474 F. Supp. 1001 (S.D. Ohio 1978) (invalidating massage parlor regulation); *Gurmankin* v. *Costanzo,* 556 F.2d 184 (3d Cir. 1977) (school district policy preventing blind persons from

teaching sighted students invalidated); *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) (requirement of graduate degree invalidated as qualification for professional licensure).

Vlandis also brought with it substantial critical response. Students of constitutional law found the *Vlandis* irrebuttable presumption doctrine a confusion of procedural and substantive due process, Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 Mich. L. Rev. 800, 823 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 Stan. L. Rev. 449, 461 (1975); a poor substitute for equal protection analysis, 72 Mich. L. Rev. at 829; 27 Stan. L. Rev. at 465; and a rejection of legislation by classification. Comment, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine,* 7 Ind. L. Rev. 644, 655 (1975).

In the two years after the *Vlandis* decision, the Court applied it only sparingly, in cases in which constitutionally protected interests were at stake, *Turner* v. *Department of Employment Security,* 423 U.S. 44 (1975); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), or the classification utterly lacked a rational basis. *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973). Like pre-*Vlandis* irrebuttable presumption cases, these decisions could have been reached by employing more traditional methods of constitutional analysis.

Since 1975, the Court has gone a step further. It has refused to employ the irrebuttable presumption doctrine to invalidate a single State classification. The Court has, instead, acknowledged that the irrebuttable presumption doctrine of *Vlandis* v. *Kline* is "a virtual engine of destruction for countless legislative judgments." *Weinberger* v. *Salfi,* 422 U.S. 749, 772 (1975).

Nevertheless, as the reliance on *Vlandis* below demonstrates, a clearer message is required. *Vlandis* v. *Kline* should be overruled.

II.

RATIONAL BASIS EQUAL PROTECTION ANALYSIS SHOULD BE APPLIED TO UPHOLD THE UNIVERSITY'S IN-STATE POLICY.

The in-state policy of the University of Maryland, in common with the tuition policies of most public colleges and universities, seeks to equalize educational costs by assigning in-state and out-of-state status (with appropriately differential tuition rates and fees) to its students. The University's method for achieving cost equalization is also like that of most public colleges and universities in the nation. Only citizens and permanent resident aliens are eligible for in-state status[3] because as a class nonimmigrants, due to their limited stay in this country or their exemption from income taxation, do not make full contributions to the cost of public higher education as do citizens and permanent resident aliens who are domiciled in the State. Similarly, in the case of financially dependent students, their domicile is irrelevant. Instead, the University looks to the parent or spouse who "pays the freight" to see if this person is a citizen or permanent resident alien domiciled in the State who should be accorded preferential in-state status. When the Armed Forces of the United States assigns one of its members to attend the University for educational purposes, the University assumes the Treasury's ability to pay out-of-state tuition and fee differentials and does not inquire into the individual student's domicile. Finally, when financially independent students who are citizens or permanent resident aliens are involved, their domicile in the

[3] *See* Affidavit of Wayne Sigler, ¶6 (J.A. 53A-54A). In some instances, the exclusion of nonimmigrants flows from the words of the policy, as is the case with the University of Maryland. In others, the policy is embodied in the State's law. *See, e.g.*, Cal. Educ. Code § 68076 (West); *Kirk* v. *Board of Regents of University of California*, 273 Cal. App. 2d 430, 436 n. 5, 78 Cal. Rptr. 260, 263-64 n. 5 (1969), *appeal dismissed*, 396 U.S. 554 (1970). In still other cases, the exclusion results from an interpretation of the policy's requirement of in-state domicile, as the respondents recognize. *See* Supplemental Brief For Respondents In Opposition at 4 n. 3.

State is the key to in-state status because they are subject to the full range of State taxation, including the State income tax so vital to the University's continued existence.

In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University of Maryland than there were nonimmigrants, and most of the permanent resident aliens qualified for in-state tuition and fees. Affidavit of Wayne Sigler, ¶¶ 3-5 (J.A. 52A-53A). Under these circumstances, it is unreasonable to conclude that the in-state policies of public institutions of higher education like the University of Maryland discriminate on the basis of alienage and thus that strict scrutiny equal protection analysis is applicable. *See* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 Sup. Ct. Rev. 275, 313 (the State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Simply put, it is clear that this Court has not been thinking of nonimmigrants when it has displayed special solicitude for "resident aliens." Indeed, as one perceptive commentator has concluded from the Court's first decision in this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham.* The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?,* 31 Stan. L. Rev. 1069, 1083 (1979). *See also*

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 Sup. Ct. Rev. at 312.

The cost equalization rationale for all in-state policies is served by ignoring the domicile of nonimmigrants, financially dependent students, and members of the Armed Forces assigned to attend the University of educational purposes. To require that a greater justification be demonstrated in the case of nonimmigrants would, we submit, be a mechanistic exaltation of form over substance which this Court should be anxious to avoid. For these reasons, we urge the Court to apply rational basis equal protection analysis to uphold the in-state policy of the University of Maryland and of most public institutions of higher education in the United States. Any other approach would not only invalidate most in-state policies but also conflict with the complementary policy of the United States Department of Education, which denies nonimmigrants low interest federal, State, and private student loans. 45 C.F.R. § 177.201 (1980).

As noted by Justice Rehnquist, dissenting from the certification of a question of State law in *Elkins* v. *Moreno,* 435 U.S. 647, 669, 675 (1978):

> [T]he University of Maryland's classification policy
>
> > "does not purport to speak in terms of the bona fides of [domicile] but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns,* [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive

them of benefits available to those who do satisfy that test." Id., [*Weinberger* v. *Salfi*, 422 U.S. 749] at 772 [(1975)].

If allowed to stand, the decision of the court of appeals threatens to imperil the fiscal integrity of public colleges and universities by making in-state tuition rates and fees available to *all* nonimmigrants, including those on student visas. *See Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."). Until the present case, no court had ever suggested that the cost-equalization rationale for according differential in-state and out-of-state tuition rates and fees could be so simplistically and devastatingly subverted.

CONCLUSION

As *amici curiae*, we urge the Court to uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all, regardless of their contributions to the costs of higher education. This would deprive State income taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the State income tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy State residents might be precluded from any higher education because of the higher cost.

We also seek to preserve an open enrollment policy among publicly-supported colleges and universities in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition and fee differentials may eliminate

this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis* v. *Kline*, 412 U.S. 441, 463 (1973) (Burger, C.J., dissenting).

Finally, we seek continuation of this Court's recognition of "[t]he State's objective of cost equalization." *Vlandis* v. *Kline*, 412 U.S. at 448. We urge the Court to facilitate this objective by upholding the right of publicly-supported institutions of higher education to classify students, including nonimmigrants, in ways reasonably calculated to achieve this goal.

As illustrated by this case, *Vlandis* v. *Kline* continues to be employed and rational in-state policies continue to be questioned. When discarded due process doctrines can be brought back to life and new equal protection analyses created to obscure the cost-equalization *raison d'etre* of in-state/out-of-state tuition and fee policies — and to imperil these policies in the process — it is time for this Court to act. For these reasons, we urge that the Court reverse the judgments of the district court and court of appeals, uphold the University of Maryland's in-state policy, and overrule *Vlandis* v. *Kline*.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1981

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and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO, *et. al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT INTER-AMERICAN DEVELOPMENT BANK *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The International Bank for Reconstruction and Development [hereinafter World Bank or Bank] is an intergovernmental organization created under Articles of Agreement[1] adopted at a conference of 44 nations at

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[1] 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 *amended* by, 16 U.S.T. 1942, T.I.A.S. No. 5929 (1945).

Bretton Woods, New Hampshire in July 1944. The Articles of the World Bank entered into force and the Bank was established on December 27, 1945. The United States ratified this international agreement and became a member of the Bank pursuant to the Bretton Woods Agreements Act of 1945, 22 U.S.C. § 286 *et seq.* (1976).

The Inter-American Development Bank [hereinafter IDB] is a regional development bank created by the Agreement Establishing the Inter-American Development Bank [2] adopted at Washington, D.C. in April, 1959. This Agreement entered into force for the United States on December 30, 1959, pursuant to the Inter-American Development Bank Act of 1959, 22 U.S.C. § 283 *et seq.* (1976).

The primary purposes of the World Bank and the IDB include making development loans to member states for productive purposes.

As of December 1981, the World Bank had 141 member governments and employed nearly 6,600 persons, including citizens of 110 countries. Its staff is located in the Bank's offices and resident missions in 36 countries. As of December 1981, the IDB had 43 member governments and employed nearly 1,900 persons from 39 countries, with its staff located in its offices and resident missions in 26 countries. Both institutions have their headquarters in Washington, D.C.

Under the Immigration and Naturalization Act of 1952,[3] a special "G-4" visa was created for officers and employees of public international organizations such as *amici*, and their families.[4] Almost 60 percent of *amici*'s

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[2] 73 Stat. 299, 10 U.S.T. 3029, T.I.A.S. No. 4397 (1959).

[3] 8 U.S.C. § 1101 *et seq.* (1976).

[4] 8 U.S.C. § 1101 *et seq.* (1976). The Act divides aliens to be admitted into the United States into two general categories: (1)

employees are non-immigrant aliens holding G-4 visas. Respondents are dependents of such employees.[5] *Amici* have a strong interest in the just and non-discriminatory treatment of their employees and their employees' dependents, including those who are not citizens of the United States. For the reasons offered below *amici* respectfully suggest that Petitioners' admission and tuition policy violates Respondents' constitutional rights.

The parties have consented to the filing of this Brief. Their letters of consent are being filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a much more limited class of aliens than Petitioners and their supporting *amici* describe. *Amici* believe this case can be decided on the narrow ground of the Supremacy Clause without resolving the sweeping due process and equal protection issues raised by Petitioners.

The University of Maryland, its President, and the 49 states which appear as *amici*, contend that if the decision

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Immigrant aliens who are admitted for permanent residence and are issued "immigrant" or "permanent resident" visas; (2) Non-immigrant aliens who are permitted to enter the United States under 12 different classifications, which correspond to the different visas they hold. The classifications appear in 8 U.S.C. § 1101(a)(15)(A) through (L). Respondents and the members of their class were admitted as non-immigrant aliens under 8 U.S.C. § 1101(a)(15)(G)(iv): "Officers, or employees of . . . international organizations and the members of their immediate families."

[5] The named plaintiffs are or were at the time the suit was brought dependents of employees of the Inter-American Development Bank and of the World Bank. Joint Appendix at 6a-14a.

below is affirmed large numbers of non-immigrant alien students will be permitted to qualify for in-state benefits, causing what they claim would be devastating financial burdens on public universities. *See, e.g.*, Brief for *amici*, Alabama *et al.* at 3. However, this case, contrary to Petitioners' implications, does not involve the entire class of non-immigrant aliens. Rather, it involves only a relatively small number of G-4 aliens who have been admitted lawfully into the United States for an indefinite period and who are able to meet the same state law standards for domicile applied to all other students and their parents. Non-immigrant aliens holding other types of visas, including student visas, requiring them to maintain residence outside the United States and all aliens, including those holding G-4 visas, who do not meet state domiciliary criteria, would not benefit from a decision in favor of Respondents and as a consequence would not be eligible for in-state tuition and admission status.

Petitioners and their supporters also raise broad questions of constitutional law. They question the continued vitality of the irrebuttable presumption doctrine and the applicability to non-immigrant aliens of the equal protection analysis relied upon by the courts below. These are extremely important questions. Nevertheless, given the circumstances of this case, *amici* wish to call this Court's attention to other grounds for decision which may preclude the necessity for deciding whether the irrebuttable presumption doctrine should be overruled or whether non-immigrant aliens are members of a suspect class.

Although *amici* herein wholeheartedly adopt Respondents' equal protection and due process analysis (*see* Brief for Respondents, Arguments I & III), we believe this case can be decided, without difficulty, on the basis of a narrow application of the Supremacy Clause. U.S. CONST. art. I, cl. 2. Supremacy Clause claims were

raised below (see Record at 193-197), and were decided by the district court. It held Petitioners' policy unconstitutional under the Supremacy Clause although it rejected one of Respondents' specific arguments in that regard concerning interference with international agreements. *Moreno v. Toll*, 489 F.Supp. 658, 667 (D.Md. 1980) (Petition for Certiorari at 29a, 44a-47a); *Moreno v. Univ. of Maryland*, 645 F.2d 217, 220 (4th Cir. 1981) (Petition for Certioari at 1a, 5a-6a).

In recent years, distinguished commentators have argued that the Supremacy Clause and federal preemption analysis provide a conceptually desirable standard for assessing state regulations that burden aliens. *See, e.g.*, C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 64-65 (1969); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063-1064 (1979); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L. J. 940 (1980).[6]

Since 1915 this Court has recognized the validity of preemption and equal protection arguments in analyzing burdens on aliens. *Truax v. Raich*, 239 U.S. 33, 39, 42 (1915). More recently, this Court has often mentioned preemption as a sound alternative in cases concerning state burdens on aliens. *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572, 602 (1976). In *Graham v. Richardson*, 403 U.S. 365, 376, 380 (1971), this Court relied

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[6] "The inadequacy of equal protection doctrine has prompted some scholars to urge the adoption of a federal preemption standard for analyzing state regulations that disproportionately burden aliens. Because of the plenary federal interest in immigration . . . and foreign affairs, federal preemption provides an appropriate framework for the analysis of alienage regulations." *Id.* at 941.

on both preemption and equal protection analyses to invalidate the challenged statute.

Petitioners' policy of charging out-of-state tuition to Maryland domiciliaries who are lawfully admitted G-4 aliens violates the Supremacy Clause in at least two ways. First, *amici* believe Petitioners' policy impermissibly conflicts with specific provisions of international agreements and federal statutes exempting G-4 aliens employed by *amici* and other international organizations from certain federal and state taxes. The dollar differential the University charges G-4 aliens for tuition is, in essence, a "tuition tax." Maryland could not directly violate international agreements ratified by Congress, nor federal statutes enacted by Congress, by imposing a state income tax on G-4 aliens. Petitioners cannot achieve the same result indirectly by imposing a "roughly equivalent" (*see* Brief for Petitioners at 23) tuition tax. The policy also reduces the funds available to implement *amici*'s objectives and purposes defined in international agreements. Because the tuition differential clearly conflicts with, burdens, and effectively nullifies the federal exemption, and interferes with the objectives of the international agreements by which *amici* were created, it is void.

Second, Petitioners' policy impermissibly intrudes upon the exclusive power of the United States government to regulate the admission and residence of aliens. State laws which impose discriminatory burdens upon the residence of lawfully admitted aliens are invalid. Petitioners' policy burdens G-4 aliens who meet the criteria for common law domicile in Maryland by requiring them to pay higher, out-of-state tuition and fees, while permitting citizens and immigrant aliens domiciled in the state to pay lower, in-state tuition and fees. The policy, therefore, conflicts with the special treatment accorded G-4 aliens by the United States and interferes with federal concern for the education of lawfully admitted

domiciliary aliens. The policy imposes additional financial burdens on G-4 aliens and subjects their dependents to unjustifiably more stringent admission requirements. Because Petitioners' interests are not sufficiently legitimate, substantial, or precisely drawn to justify this significant conflict with the federal government's plenary power to regulate the admission and residence of aliens, their policy is invalid.

Amici respectfully suggest that where, as here, a state policy conflicts with specific international agreements and federal statutes, and also interferes with the exclusive power of the government of the United States to regulate the residence of aliens it is void under the Supremacy Clause.

ARGUMENT

I. PETITIONERS' POLICY IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPERMISSIBLY CONFLICTS WITH SPECIFIC INTERNATIONAL AGREEMENTS CREATING INTERNATIONAL ORGANIZATIONS SUCH AS *AMICI* AND WITH SPECIFIC FEDERAL STATUTES WHICH EXEMPT EMPLOYEES OF *AMICI* FROM CERTAIN FEDERAL AND STATE INCOME TAXES.

A. State Law Which Burdens or Conflicts with International Agreements or Federal Laws is Void Under the Supremacy Clause.

Amici believe that Petitioners' policy impermissibly conflicts with specific provisions of international agreements[7] and their implementing federal statutes exempting G-4 employees of *amici* and similar international organizations from certain federal and state income taxes. For example, the Articles of Agreement of the World Bank specifically provide that "no tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals." 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, § 9(b); *accord*, Agreement Establishing the Inter-American Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, § 9(b). These provisions are also incorporated into federal law providing that this tax exemption shall have "full force and effect" in the United States. 22 U.S.C. § 286h (1976).

This exemption is designed to benefit *amici* and other international organizations by enabling them to pay

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[7] International agreements authorized by Congress are equivalent to treaties for Supremacy Clause purposes. *Foster v. Nielson*, 27 U.S. 253, 314 (1812).

salaries without regard to the costs of taxation, thereby conserving their fiscal resources and thus permitting them to increase their lending activities to less developed countries. Moreover, the exemption prevents any member country, be it the United States or any other member country, from benefiting through taxes from the presence, within its borders, of *amici*'s employees who are not local nationals. The United States has explicitly recognized that the international agreements and statutes creating these exemptions are solely intended to benefit *amici* and other international organizations. Even if their employees wished to waive the exemptions in order to comply with Petitioners' policies they could not. 41 OP. ATT'Y GEN. 170, 172-173 (1954).

If Petitioners' policy "burdens or conflicts in any manner with any federal law or treaties," *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976), it may be found invalid under the Supremacy Clause. Indeed, if a state policy conflicts with a specific treaty or federal law, it is not necessary even to consider the justification for the policy or to balance it against the importance of the federal law or treaty. In fact, the Court need not pause to inquire whether there is any justification for the state policy, since "no state policy can prevail against" an international agreement. *United States v. Belmont*, 301 U.S. 324, 327 (1937).[8]

B. The State of Maryland Could Not Constitutionally Require G-4 Aliens Employed by *Amici* to Pay State Taxes on Income Paid by *Amici* and Petitioners May Not Accomplish Indirectly What the State Could Not Accomplish Directly.

Without doubt, if Maryland law required G-4 aliens to pay income taxes on their salaries paid by *amici*, it would

[8] "[T]he external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning." *Id.* at 331.

be void under the Supremacy Clause. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-420 (1948); *United States v. Belmont*, 301 U.S. 324, 332 (1937). Just as clearly, Petitioners may not accomplish indirectly what the State is not permitted to do directly.

That Petitioners penalize Respondents on account of their partial exemption from state income tax is evident from the record. Petitioners assert that an important rationale for their policy of denying in-state status to G-4 aliens is "cost equalization." Petitioners' explanation for charging lower tuition payments to other students is based on their assumption (not supported in the record) that those students already have made a significant contribution to the state university system through payment of state taxes.[9] Now that it is clear that G-4 aliens can acquire legal domicile in Maryland, see *Elkins v.*

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[9] G-4 aliens domiciled in Maryland do pay state taxes on income other than that obtained from *amici*. They also pay state property, sales, and other taxes. Many G-4 aliens are married to United States citizens who pay Maryland taxes on their income. Many others are married to alien spouses who, under federal regulation, are permitted to work and who also pay state tax on their income. 8 C.F.R. § 214.2(g)(2). Yet, under Petitioners' policy, dependents of *amici's* G-4 employees are compelled to pay out-of-state tuition. For example, Petitioners denied in-state tuition status to a United States citizen child of a G-4 employee of one of the *amici* who has lived in Montgomery County, Md. since 1963, is married to a U.S. citizen who has been regularly employed and has regularly filed state income tax returns. In another case, a husband and wife, both G-4 aliens, domiciled in Montgomery County since 1967, who have filed state income tax returns on rental property they own in Maryland, were denied in-state tuition status for their child, a U.S. citizen.

Conversely, citizens and permanent resident aliens whose incomes are insufficient to incur any state income taxes or whose incomes may be tax-exempt can nevertheless qualify for in-state status. Clearly, Petitioners' policy is not based on true cost equalization.

Moreno, 435 U.S. 647 (1978), Petition for Certiorari at 105a; *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), Petition for Certiorari at 137a, cost equalization between taxpayers and non-taxpayers has been the primary rationale advanced for denying nontaxpayers in-state status. Petitioners' Brief at 7, n.5.

Petitioners have claimed that the difference between in-state and out-of-state tuition is "an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year." Petitioners' Brief at 23. If Petitioners' policy is permitted to stand, a part of the tax exemption the federal government explicitly conferred on G-4 alien employees of *amici* and certain other international organizations will be nullified for those employees whose dependents wish to attend the University of Maryland. Petitioners' policy attempts to substitute a tuition differential for the tax that is barred by international agreements and by a specific federal statute. Accordingly, it "burdens or conflicts" with a clearly defined federal policy and, *amici* believe, is void under the Supremacy Clause. *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976).

C. Petitioners' Policy Hampers the Operation and Objectives of *Amici*.

Petitioners seek to defend the challenged tuition differential on the ground that "neither the students nor their parents need to pay the differential at all, because the bank itself pays it in the form of tuition equalization subsidy." Brief for Petitioners at 23. Although *amici* are currently reimbursing their employees for various portions of the difference between the in-state and out-of-state tuition charges levied by Petitioners, that fact supports Respondents, not Petitioners. To attract and maintain a competent professional staff, *amici* have had to divert funds from other purposes to provide a tuition subsidy. Petitioners candidly acknowledge the direct connec-

tion between the University's policy and the tax exemption granted under international agreements. They state that the "dollar differential" at issue here is "roughly equivalent to the amount of state income tax an international bank parent is spared" each year by treaty. *Id.* *Amici* are forced to pay that "dollar differential" and every dollar they pay reduces the intended benefits of that tax exemption and reduces the funds available to implement *amici's* international objectives and purposes.

Amici's concern has also been recognized by the United States in the context of a prior unsuccessful attempt by Montgomery County, Maryland to force G-4 alien employees of international organizations residing in that County (some of whom were County domiciliaries) to pay at least partial tuition if they wished their children to attend the County's public elementary and secondary schools. *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Mont. Cty. Cir. Ct.) (filed June 25, 1979).[10] The U.S. Department of State noted that the

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[10] After the suit was filed, but before decision, the Board of Education adopted a substitute policy which provided for the collection of tuition from students enrolled in the Montgomery County public schools who were not legally domiciled in the County. The policy included a presumption that aliens (but not citizens) could not be domiciled in the State unless they made an affirmative showing of domicilary status. That policy also provided that non-domiciled students would receive a proportionate credit against tuition to the extent their parents "make payment from one or more of the major sources from which the Montgomery County public schools derive revenue"—namely state and local income taxes, state sales taxes, and county property taxes. The Circuit Court stayed further proceedings pending an administrative appeal to the State Board of Education. The case was resolved when the State Board decided that the challenged policy, by denying free public education to certain residents of the State, was "invalid both as a matter of law and as being contrary to the educational policies of the state." Statement of Decision, No. 79-10, August 29, 1979. Subsequently, the case was dismissed by the court.

proposed tuition differential had "aroused considerable concern within the diplomatic and international organization community" and had "the potential for affecting adversely relations between the United States and foreign countries whose representatives are serving here in an official capacity." [11] The U.S. Treasury Department recognized that international financial institutions, like *amici*, played an ever-increasing role in the promotion of a sound international monetary system and in the economic development of less-developed countries and asserted that the County's policy, like the Petitioners' policy challenged here, would seriously interfere with their mission:

> For these institutions to perform properly their important duties, it is essential that they continue to attract capable professionals from many countries to serve on their staffs. Imposition of the proposed tuition charges could create a severe hardship for many prospective employees, particularly those in lower pay scales, and could hinder the recruiting of the highly-qualified individuals the institutions require.[12]

Therefore, because Petitioners' policy impermissibly interferes with the objectives, as defined by international agreements, of *amici* and similar international organizations, *amici* believes it is invalid under the Supremacy Clause.[13]

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[11] Letter from Kit Dobelle, Chief of Protocol, U.S. Dep't of State, to Mrs. Marian Greenblatt, President, Board of Education, Montgomery County (March 16, 1979), filed with the Court in *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Montgomery Cty. Cir. Ct.) (filed June 25, 1979).

[12] Letter from C. Fred Bergsten, Asst. Sec. for International Affairs, U.S. Dept. of Treasury, to Mrs. Marian Greenblatt, President of the Montgomery County Board of Education (April 19, 1979), filed with the Court in *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Montgomery County Cir. Ct.) (filed June 25, 1979).

[13] Although it would be inappropriate for *amici* to inform this Court of its own nation's foreign policy, *amici* note that the United States considers its "participation in . . . international financial

II. PETITIONERS' POLICY IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPERMISSIBLY INTERFERES WITH THE EXCLUSIVE POWER OF THE FEDERAL GOVERNMENT TO REGULATE THE ADMISSION AND RESIDENCE OF ALIENS.

A. The Admission and Residence of Aliens is Exclusively a Federal Concern.

Under the United States Constitution, Congress has the exclusive authority over matters of immigration and naturalization. U.S. CONST. art I, § 8, cl. 4; *Henderson v. Wickham*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876).[14] In a proper exercise of its power,

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institutions" to be "an important part of efforts by the United States to assist less developed countries . . . ." 22 U.S.C. § 262c (a)(5) (1976). Further, the Senate Foreign Relations Committee has indicated that it believes such institutions "play an important role in assisting the economic and social progress of the developing countries" and that this role has helped "develop sounder mutually beneficial relations . . . [between the United States and] developing countries." S.REP. NO. 159, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 2670, 2677. More recently, the House of Representatives noted that "the banks serve as important bridges, helping to link the political and economic concerns of their donor and recipient countries . . . . The banks provide forums for constructive dialogue and cooperative action on common international problems . . . ." HOUSE COMM. ON THE BUDGET, Report on THE OMNIBUS RECONCILIATION ACT OF 1981, H.R. REP. NO. 158, Vol. 1, 97th Cong., 1st Sess. 3 (1981) (Testimony of Deputy Ass't Sec. of the Treasury Thomas Dawson urging "continued strong western support for the banks.")

That Petitioners' policy may interfere with the international commitments of the United States and its relationships with foreign governments, emphasizes the propriety of resolving this case on Supremacy Clause grounds. *E.g., Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *United States v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

[14] See to the same effect *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81, 84-85 (1976); *De Canas*

Congress enacted the Immigration and Naturalization Act of 1952 (INA), 8 U.S.C. Sec. 1101 *et seq.*, establishing a comprehensive federal scheme for the admission and residence of aliens. As part of that scheme, Congress provided for the admission and indefinite residence of non-immigrant aliens who are officials or employees of international organizations in which the United States participates. 8 U.S.C. § 1101(a)(15)(G)(iv); 22 C.F.R. § 41.1 (1981).

"Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). "State laws which impose discriminatory burdens upon the entrance or *residence* of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis added). State regulation "not Congressionally sanctioned that discriminates against aliens lawfully admitted to the country" violates the Supremacy Clause if it "imposes additional burdens not contemplated by Congress." *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1975).

B. Petitioners' Policy Imposes Additional Burdens on the Residence of Aliens Not Contemplated by Congress.

In the INA Congress provided that G-4 aliens are not precluded from acquiring domicile in the United States, although most other categories of non-immigrant aliens are not accorded that benefit. *Elkins v. Moreno*, 435 U.S. 647, 663-668 (1978); Petition for Certiorari at 119a-125a. Congress has also decided that G-4 aliens employed by *amici* may reside and establish domicile in the United

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v. Bica, 424 U.S. 351, 354 (1976); *Graham v. Richardson*, 403 U.S. 365, 376-380 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Chinese Exclusion Case*, 130 U.S. 581 (1889).

States without becoming subject to certain federal and state taxes on income received from *amici* and other international organizations. Thus, for reasons it found sufficient, Congress has granted G-4 aliens special privileges not ordinarily accorded non-immigrant aliens.[15]

Petitioners' policy interferes with that federal scheme in two ways. First, it is inconsistent with the federal determination that G-4 employees of *amici* and other international organizations are entitled both to establish domicile in the United States and an income tax exemption on their official salaries. It thus impairs the privileges Congress conferred. *See* Argument I(B).

Second, it imposes additional and discriminatory burdens upon G-4 aliens domiciled in Maryland not contemplated by Congress. The most obvious discrimination is financial. The policy requires that G-4 aliens pay higher tuition and fees while permitting citizens and immigrant aliens to pay lower tuition and fees.[16]

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[15] Petitioners' point to two federal statutes which deny certain classes of aliens welfare or educational benefits offered to citizens. Brief for Petitioners at 24. Petitioners then argue that their policy is permissible because it is consistent with federal policy. But this Court has made clear that state distinctions affecting aliens must stand or fall on their own merits. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) in which this Court explained why it had earlier, in *Mathews v. Diaz*, 426 U.S. 67 (1976), applied "relaxed scrutiny" to the validity of a federal statute conditioning an alien's eligibility for Medicare benefits on the satisfaction of a durational residency requirement, even though there was no similar burden on citizens. As the Court pointed out, "the appellants can draw no solace from the [*Diaz*] case, however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *See also, Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) ("[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State."); *Oyama v. California*, 332 U.S. 633, 665 (1948) ("The state acquires no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens on a racial basis.").

[16] Throughout this litigation Petitioner's have maintained that their policy cannot be construed as discriminating against aliens

However, the burdens are not merely monetary. Perhaps even more importantly, denial of in-state status subjects the student to more stringent admission standards and may result in denial of admission to the University. Like most other state universities, Maryland reserves a a large proportion of its admissions for in-state applicants. Thus, even though Respondents are domiciliaries and residents of Maryland, *see Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), they are more likely to be denied admission than are applicants Petitioners consider to be in-state candidates despite the fact that their academic credentials are equivalent or even higher. *See, University of Maryland, Determination of In-State Status for Admission, Tuition, and Charge Differential Purposes.* Petitioners' Brief for Certiorari at 167a. If Respondents sought admission to universities outside of Maryland they would clearly and appropriately be considered nonresidents of those other states. Accordingly, if Petitioners' policy stands, there will be no state in which Respondents could qualify for in-state status, or could compete on an equal basis with other applicants.

Amici believe that the interests asserted by Petitioners to justify their policy are not sufficiently legitimate, substantial or precisely drawn to withstand constitutional scrutiny. *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976); *see* Brief for Respondents, Argument I(B). Prior to 1974, the University apparently functioned quite effectively without any such policy. Furthermore, the justifications asserted by Petitioners have shifted dramatically in the course of this litigation. Even the "cost equalization" rationale now asserted bears little relationship to real world facts—

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because it applies only to non-immigrant aliens, not all aliens. However, a state's classification can be unconstitutional even if it discriminates solely against a subclass of aliens. *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977). "The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9.

many G-4 aliens (and their spouses) contribute substantially to the revenues of the state; many citizens and permanent resident aliens do not.[17] Further, permanent resident aliens employed by *amici* have the same tax exemption as G-4 visa holders but are nonetheless considered students for tuition and admission purposes by Petitioners. If "cost equalization" were truly the touchstone, the University could adopt a much more precisely tailored policy. Deference to a state policy which intentionally treats domiciliary aliens in a discriminatory manner substantially undermines Congress' power to regulate the admission and residence of aliens in the United States.

CONCLUSION

Amici are international persons created by over 100 sovereign nations including the United States. As *amici* have shown, Petitioners' policy has an impact not only on Respondents and their families but also on the institutions Respondents serve. Since the policy at issue in this case conflicts with specific treaties and federal laws, and also interferes with the exclusive federal power to regulate the residence of aliens, *amici* respectfully suggest that the policy violates the Supremacy Clause of the United States Constitution. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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December 21, 1981

[17] *See supra* n.9.

CERTIFICATE OF SERVICE

I, Donald N. Bersoff, Attorney for *Amici Curiae*, certify that on December 21, 1981, I served by mail three copies of the foregoing brief of *Amici Curiae* on Stephen H. Sachs, Attorney General of Maryland, 1400 One South Calvert Building, Baltimore, Maryland 21202, Counsel for Petitioners, and on James R. Bieke, Esquire, Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036, Counsel for Respondents.

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